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Supreme Court
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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

STEVE EDWARD ROACH,
Petitioner,

v.

DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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Dated: August 30, 1999

12 pp

THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. When a State's law requires a proportionality review of death sentences by its highest court, does a defendant under sentence of death have a constitutional right to due process of law in the manner in which that review is conducted?

2. Are there constitutional minimum standards of evidence required to sustain the claim that a capital defendant would be a future danger to society sufficient to justify the death penalty?

3. In determining whether a person convicted of capital murder deserves the death penalty under the "future dangerousness aggravator," does it comport with the defendant's due process rights to ask the jury a conditional question while denying it critical information about the premise?

4. Is a capital defendant effectively denied his constitutional right to a fair trial when the judge erroneously

instructs the jury at the sentencing stage that it had to be unanimous in its decision, when applicable laws require that only a sentence of death, but not life, be unanimous? and

5. Does a person aged under 18 at the time of his arrest have a constitutional right to an individualized assessment of his maturity and responsibility before he may be transferred from juvenile court for trial as an adult?

STATEMENT OF CORPORATE AFFILIATIONS

Petitioner Steve Edward Roach is an individual; Respondent is an official of the Government of the Commonwealth of Virginia.

Table of Contents

QUESTIONS PRESENTED i
STATEMENT OF CORPORATE AFFILIATIONS iii
Table of Authorities vii
OPINIONS BELOW 1
JURISDICTION 2
STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
A. Introduction 2
B. Facts 3
C. The Decision Below 5
REASONS FOR GRANTING THE WRIT 6
1. Petitioner Was Denied Due Process in the Manner in Which the Supreme Court of Virginia Carried Out the Proportionality Review Required by Virginia Law 6
2. The Evidence Submitted to the Jury at the Sentencing Phase was Insufficient as a Matter of Constitutional Right to Justify a Sentence of Death on the Grounds of Future Dangerousness 13
3. Petitioner Was Denied Constitutional Due Process Rights When His Sentencing Jury Was Not Permitted to Know the Alternative to the Death Penalty 16
4. Petitioner Was Denied His Constitutional Right to a Fair Trial When the Judge Erroneously Instructed the Jury at the Sentencing Stage About the Need for Unanimity and the Consequences of Failure to Achieve It. 25
5. Petitioner, Ages under 18 at the Time of His Arrest, Was Denied His Constitutional Right to an Individualized Assessment of His Maturity and Responsibility Before Being Transferred from Juvenile Court for Trial as an Adult 29
CONCLUSION 30

APPENDIX
Opinion of the United States Court of Appeals for the 4th Circuit 1a

Opinion of the Virginia Supreme Court 30a
Denial of Petition for Writ of Certiorari (1996).....60a
Denial of Petition for Writ of Certiorari (1998).....61a
Opinion of the United States District Court for the Western
District of Virginia.....62a
Denial of Petition for Rehearing in the United States Court
of Appeals for the 4th Circuit.....84a
Order Setting Date of Execution 85a
Order Awarding Appeal from the Circuit Court of
Greene County.....87a
Order Granting a Stay of Execution.....90a
28 USC § 2254 .....92a

Table of Authorities

Statutes

18 U.S.C. § 3594 28

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 ..... 2, 5

Va. Code § 16.1-269 30

Va. Code § 17-110(C)(2) 6, 9, 10

Va. Code § 19.2-264.2 ..... 2, 5, 14

Va. Code § 19.2-264.4 (B) 30

Va. Code § 19.2-264.4(C) 13

Va. Code § 19.2-264.4(E) 26

Va. Code § 53.1-165.1 18

Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), *cert. den.*, 514 U.S. 1108 (1995) 22

Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997), *cert. den.*, 118 S.Ct. 715 (1998) 28

Beaver v. Commonwealth, 232 Va. 521 (1987) 12

Beck v. Alabama, 447 U.S. 625 (1980) 25

Bellotti v. Baird, 443 U.S. 622 (1979) 29

Bollenbach v. United States, 326 U.S. 607 (1946) 20

Boyde v. California, 494 U.S. 370 (1990) 21, 25

Brown v. Texas, 118 S.Ct. 355 (1997) 23

California v. Ramos, 463 U.S. 992 (1983) 25

Chandler v. Commonwealth, 455 S.E.2d 219, *cert. den.*, 116 S. Ct. 233 (1995) 7, 8, 12

Chichester v. Commonwealth, 448 S.E.2d 638 (1994), *cert. den.*, 115 S. Ct. 1134 (1995) 7, 8

Clark v. Commonwealth, 220 Va. 201 (1979) 12, 22

Clemons v. Mississippi, 494 U.S. 738 (1990) 13

DeLong v. Thompson, 790 F. Supp. 594 (E.D. Va. 1991), *aff'd (mem.)*, 985 F.2d 553 (4th Cir. 1993) 28

Eaton v. Commonwealth, 397 S.E.2d 385 (1990), *cert. den.*, 502 U.S. 824 (1991) 27

Eddings v. Oklahoma, 455 U.S. 104 (1982) 29

Edmonds v. Commonwealth, 229 Va. 303 (1985) 14, 15

Evitts v. Lucey, 469 U.S. 387 (1985) 7

Frye v. Commonwealth, 231 Va. 370 (1986) 12

Furman v. Georgia, 408 U.S. 238 ..... 19, 25

Gardner v. Florida, 430 U.S. 349 (1977) 18

Godfrey v. Georgia, 446 U.S. 420 (1980) 6, 25

Graham v. Collins, 506 U.S. 461 (1993) 17, 18

Hoke v. Commonwealth, 377 S.E.2d 595, (1989), *cert. den.*, 491 U.S. 910 (1989), and 502 U.S. 880 (1991) 15

Jones v. United States, 119 S. Ct. 2090 (1999) 28

Joseph v. Commonwealth, 452 S.E.2d 862 (1995) 7, 8, 12

Jurek v. Texas, 428 U.S. 262 (1976) 25

Komahrens v. Evatt, 66 F.3d 1350 (4th Cir. 1995), *cert. den.*, 116 S.Ct. 1575 (1996) 28

Lockett v. Ohio, 438 U.S. 586 (1978) 28, 29

Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) 27

McKoy v. North Carolina, 494 U.S. 433 (1990) 27, 28

Mills v. Maryland, 486 U.S. 367 (1988)..... 21, 26, 27, 28

Murphy v. Commonwealth, 246 Va. 136 (1993) 12

New Jersey v. T.L.O., 469 U.S. 325 (1985) 29

Parker v. Dugger, 498 U.S. 302 (1991)..... 13

Perry v. Lynaugh, 492 U.S. 302 (1989)..... 27

Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d. 815 (1985), *cert. den.*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985)... 15

Proffitt v. Florida, 428 U.S. 242 (1976)..... 11

Pulley v. Harris, 465 U.S. 37(1984) 6, 10, 11

Royal v. Commonwealth, 458 S.E.2d 575 (1995), *cert. den.*, 116 S.Ct. 823 (1996)..... 15

Saunders v. Commonwealth, 242 Va. 107 (1991)..... 12

Simmons v. South Carolina, 512 U.S. 154 (1994).....passim

Smith v. Commonwealth, 248 S.E. 2d 135 (1978), *cert. den.*, 441 U.S. 967 (1979)..... 14

Solem v. Helm, 463 U.S. 277 (1983) 11

Spencer v. Commonwealth, 393 S.E.2d 609 (1990), *cert. den.*, 498 U.S. 908 (1990)..... 15

Stanford v. Kentucky, 492 U.S. 361 (1982) 29, 30

Strickler v. Commonwealth, 241 Va. 482 (1991)..... 12

Thomas v. Commonwealth, 244 Va. 1 (1992)..... 12

Thompson v. Oklahoma, 487 U.S. 815 (1988).....28, 29

Tuggle v. Netherland, 516 U.S. 10 (1993)..... 13

Walton v. Arizona, 487 U.S. 639 (1990) 10

Wilkins v. Bowersox, 933 F. Supp. 1496 (W.D. Mo. 1996)..... 8

Williams v. Commonwealth, 234 Va. 168 (1987)..... 12

Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998).....22, 24

Woodson v. North Carolina, 428 U.S. 280 (1976) 24

Wright v. Commonwealth, 427 S.E.2d 379 (1993), *cert. granted on other grounds*, 512 U.S. 1217 (1994), 450 S.E.2d 361 (1994), *cert. den.*, 514 U.S. 1085 (1995) 15

Yeatts v. Commonwealth, 410 S.E.2d 254 ..... 7, 8

Zant v. Stephens, 462 U.S. 862 (1983) 29

Other

"The Meaning of 'Life' for Virginia Jurors and Its Effect on Reliability in Capital Sentencing," 75 Virginia Law Rev. 1605, 1636 (1989) 24

Bowers, Vandiver, & Dugan, "A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer," 22 Am. J. Crim. L. 77 (1994) 24

Petitioner Steve Edward Roach respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, affirming the order of the United States District Court for the Western District of Virginia, denying his petition for a writ of habeas corpus.

OPINIONS BELOW

The decision of the Fourth Circuit of which review is sought is reported as *Roach v. Angelone*, 176 F.3d 210 (4th Cir. 1999). *See* the Appendix hereto ("App."), pp. 1a-29a.

Petitioner was convicted of capital murder and sentenced to death by the Circuit Court of Greene County, Virginia, in 1995. The conviction and sentence were upheld on direct appeal by the Supreme Court of Virginia. *Roach v. Commonwealth*, 468 S.E.2d 98 (Va. 1996). App., pp. 30a-59a. This Court denied certiorari. *Roach v. Virginia*, 117 S.Ct. 365 (1996). App., p. 60a.

A State habeas corpus petition was unsuccessful: the Commonwealth Supreme Court rejected it in an unpublished opinion on April 30, 1997. This Court again declined review. *Roach v. Angelone*, 118 S.Ct. 713 (1998). App., p. 61a.

The United States District Court for the Western District of Virginia on July 28, 1998, refused to issue a Federal habeas corpus writ, App., pp. 62a-83a. Its decision was affirmed on appeal by the Fourth Circuit. App., pp. 1a-29a. When reconsideration and en banc review of the panel decision were denied on June 1, 1999, App., p. 84a, the Greene County, in hearing conducted by telephone, ordered that Petitioner would die on August 25, 1999. App., pp. 85a-86a.

Meanwhile, on June 11, 1999, the Virginia Supreme Court issued its opinion in *Commonwealth v. Baker*, No. 982102 (*per curiam*), holding that both of the parents of a juvenile defendant must be provided actual notice of his proposed

certification to stand trial as an adult, and that convictions obtained in violation of that right are void. On August 6, 1999, the Supreme Court of Virginia accepted the appeal in *Roach v. Commonwealth*, Record No. 991817, consolidated it with a habeas corpus petition filed *sub nom. Roach v. Director*, No. 991816, and stayed Petitioner's sentence of death. App., pp. 87a-91a. Briefing in those cases is currently underway, and oral argument is scheduled for September 15, 1999.

JURISDICTION

Reconsideration and en banc review of the panel decision in the Fourth Circuit were denied on June 1, 1999. The mandate of the court of appeals was issued promptly thereafter. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision at issue is 28 U.S.C. § 2254, which is set out in the Appendix at pp. 92a-94a.

STATEMENT OF THE CASE

A. Introduction

This case seeks review of a death sentence imposed on Petitioner, 17 years of age at the time of the crime of which he was convicted, by the Commonwealth of Virginia. Petitioner was sentenced to death for the murder of his neighbor, Mary Anne Hughes, on December 3, 1993.

After the jury returned a verdict of guilty of capital murder, Petitioner was condemned on the strength of the "future dangerousness aggravator" – that is, jurors found, beyond a reasonable doubt, the probability that Petitioner "would represent a continuing serious danger to society." *See* Code of Virginia § 19.2-264.2.[1]

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[1]The trial judge removed from the jury's consideration the "aggravator" based on the "vileness" of the crime. Va. Code § 19.2-

Petitioner's entire criminal record prior to the murder of Mary Anne Hughes consisted of two joyriding incidents (along with vehicle offenses), a single breaking-and-entering, and a violation of the terms of his parole. No evidence of future dangerousness was published to the jury beyond this.

In reviewing this sentence in compliance with Virginia law mandating "proportionality review," the Commonwealth Supreme Court held that "while there are exceptions, juries in the Commonwealth generally impose the death sentence for crimes comparable or similar" to Petitioner's. This conclusion was reached despite the uncontroverted fact that no other Virginia defendant sentenced to death on the future dangerousness aggravator, since the reinstatement of the death penalty in 1976, had nearly so light a record of violent behavior, nor was any crime for which such a sentence was upheld less indicative of a propensity to violence.

Petitioner respectfully submits that the Virginia Supreme Court, although required by State law to review proportionality, must do so in accordance with federal due process guarantees, and it failed to do so in this case. Petitioner's jury was also impermissibly denied the answer to its express question regarding the alternative to the death penalty, in violation of this Court's teaching in *Simmons v. South Carolina*, 512 U.S. 154 (1994); that the judge misled the jury as to the consequences of a lack of unanimity in sentencing; and that Petitioner was denied constitutional rights in the application of the Virginia statute regarding the transfer of juveniles to stand trial as adults. On each of these issues, the court of appeals below confirmed errors of constitutional magnitude, which, if unreviewed by this Court, will cost Petitioner his life.

B. Facts

264.4(C) (Michie 1995). He allowed the "future dangerousness" aggravator to be presented, although he noted that the case was "on the far spectrum" even with respect to that issue.

The essential facts of this case are not in dispute, and are summarized adequately in the decision of the court of appeals below.

On the night of December 3, 1993, according to his confession, Petitioner Steve Edward Roach – who had never before committed a criminal act of violence against another person – without provocation, deliberation, or warning, killed his 70-year-old neighbor, Mary Hughes, with a single shotgun blast. At the time, Petitioner was 17 years old. Six weeks before his nineteenth birthday, he was convicted of capital murder, and was sentenced him to death for the crime.

In May 1993, Petitioner had gotten into trouble with the police for the first time in his life. He was found guilty in juvenile proceedings of auto theft, and of driving violations, when he found a car on the street with keys in the ignition. He was convicted of breaking and entering a private residence and stealing a pistol on June 11, 1993. Nobody was home, and no one was hurt or threatened. And he committed a second theft, on August 2, 1993, again of a car with the keys left in it.

That was Steve Roach's entire criminal record, before the killing of Mary Hughes. No misconduct involved weapons or violence. There was no record of abuse of alcohol or drugs. He was sentenced to house arrest for the juvenile offenses, was placed under certain probation restrictions.

The evidence presented at the trial indicates that, having seen Ms. Hughes at her kitchen table on December 3, 1995, Petitioner impulsively decided to rob her. He knocked on the door, and, when Ms. Hughes answered, wordlessly killed her with a single, point-blank shotgun blast. There was no indication of a struggle, and the nature of her injuries suggests that Ms. Hughes died instantly. Petitioner took cash, credit cards, an ATM card, and car keys. He then fled in her car, ultimately stopping in South Carolina.

Three days later, Roach returned to Virginia on his own initiative. He contacted the Sheriff of Greene County, waived

his *Miranda* rights, and made a full confession, which formed the basis for the case against him.

On May 13, 1994, the Greene County Juvenile Court issued a transfer order certifying him for trial as an adult. After that order was vacated and the case remanded for further proceedings, the juvenile court conducted a second hearing, on July 22, 1994, and again transferred the case.

On October 11, 1994, a grand jury returned indictments against Roach for the capital murder of Ms. Hughes, and also for robbery and the unlawful use of a firearm. Petitioner was tried in the Circuit Court of Greene County, Virginia, on February 28 and March 1 and 2, 1995. Judge Lloyd Sullenberger presided. The jury found him guilty of all charges.

The sentencing phase lasted less than a day. On March 3, 1995, the jury fixed the sentence at death, finding beyond a reasonable doubt the probability that Petitioner would represent a continuing serious danger to society. *See* Code of Virginia § 19.2-264.2.

On May 9, 1995, in accordance with the jury's verdict, Petitioner was sentenced to death for capital murder, to life imprisonment for robbery, and to three years incarceration for the unlawful use of a firearm in committing a murder.

C. The Decision Below

The Fourth Circuit affirmed the decision of the district court, denying a petition for a writ of habeas corpus under 28 U.S.C. § 2254.

The circuit court correctly noted that there is no federal constitutional right to a proportionality analysis, and that the federal courts have no role in the interpretation of State statutory law. But the court erred in concluding, on this basis, that the mere recitation by the State court that it conducted a proper analysis is sufficient to sustain the conclusion that it actually did so. In this case, such a comparison cannot have

been conducted: if it had, death penalty in this case could not have been found to be proportionate, given both Petitioner's record and the facts of the murder of which he was convicted.

The circuit court dismissed Petitioner's other arguments essentially holding that each sought to have the bench substitute its judgment for that of the jury.

REASONS FOR GRANTING THE WRIT

1. Petitioner Was Denied Due Process in the Manner in Which the Supreme Court of Virginia Carried Out the Proportionality Review Required by Virginia Law.

In *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), this Court held that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." The Eighth Amendment requires procedures to narrow the class of persons to be condemned to death, to ensure that capital punishment is doled out fairly and consistently.

The Constitution does not dictate any particular method of achieving these goals. The way of doing so adopted in Virginia is comparing each capital case with others of like characteristics. This Court has held that States are not obligated to assess the proportionality of death sentences. *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). They may determine that sentencing is fair and equitable by other methods. Whatever mechanism they do elect, however, the Constitution requires that they carry it out in accordance with due process principles. And therefore, there is an important federal interest in the application of the test under State law.

States that require proportionality analyses of capital sentences must, therefore, actually provide them, or they will be denying due process of law to defendants in a manner violative of the federal Constitution. The Commonwealth Supreme Court must determine whether a death sentence "is excessive or disproportionate to the penalty imposed in similar

cases, considering **both** the crime **and** the defendant." Va. Code § 17-110(C)(2) (emphasis added). By assigning this responsibility to its highest court, Virginia has brought its proportionality review mechanism within the ambit of Fourteenth Amendment protection. It must conform to due process principles: it may not be omitted, or corrupted, or infected by prejudice. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).[2]

In reviewing the penalty of death to which Petitioner had been sentenced, the Virginia Supreme Court first referred to some 16 cases involving robberies in which it had affirmed death sentences on the grounds of future dangerousness. Those were cases compiled in *Yeatts v. Commonwealth*, 410 S.E.2d 254, 267-68 (1992), and in *Chichester v. Commonwealth*, 448 S.E.2d 638, 652 (1994), *cert. den.*, 115 S. Ct. 1134 (1995), as well as additional cases decided after *Chichester*: *Chandler v. Commonwealth*, 455 S.E.2d 219, *cert. den.*, 116 S. Ct. 233 (1995), and *Joseph v. Commonwealth*, 452 S.E.2d 862 (1995). And it noted, without citation, that it had "also reviewed the records in capital murder cases in which robbery was the underlying offense and a sentence of life imprisonment was imposed."

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[2]In *Evitts*, this Court taught that when a State chooses to take discretionary action, it must do so within the bounds of due process. The Court wrote that:

> [f]or instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. . . . Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. . . . In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.

469 U.S. at 400-01 (emphasis added) (citations omitted).

The court then wrote:

> Based on this review, we conclude that, while there are exceptions, **juries in this Commonwealth generally impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes.** Roach killed an elderly, defenseless friend with a shotgun at point blank range in the process of robbing her of her social security funds. This crime, like the other death sentence crimes we have reviewed, shows extreme cruelty and lack of respect for human life.

Roach v. Commonwealth, 251 Va. 324, 351, *cert. den.*, 117 S. Ct. 365 (1996) (emphasis added) (parallel citations omitted).

Petitioner respectfully submits that there is no conceivable way in which the key half-sentence in this section of the opinion highlighted in bold above can be inferred from the material available to the Court. What happened here, therefore, was not merely an incorrect application of Virginia law, but an outright denial of any meaningful proportionality review. This resulted in an arbitrary deprivation of the liberty interest created by the Commonwealth, and therefore constitutes a denial of the due process of law.[3]

Looking at the very cases that the Virginia court said that it considered – those compiled in *Yeatts* and *Chichester*, plus *Chandler* and *Joseph* – Petitioner submitted to the courts below a chart displaying the characteristics of all of the offenders and their crimes. Of the 16 individuals whose death sentences based on the future dangerousness aggravator were affirmed, every one had a record involving assault or robbery, usually

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[3] *See, e.g., Wilkins v. Bowersox*, 933 F. Supp. 1496 (W.D. Mo. 1996) (granting a writ of habeas corpus because, among other things, the Supreme Court of Missouri did not perform a meaningful proportionality review).

involving deadly weapons.[4] At least nine had prior convictions and served substantial sentences for crimes of violence. At least six had histories of drug dependence or distribution. None was less than 20 years old at the time of the offense.[5]

None of these offenders was "comparable" to Steve Roach aged 17, with no violent history, and no record of abuse of drugs. Regarding the crimes of the 16 individuals whose cases the Supreme Court reviewed, not one consisted of only a single (albeit deadly) shot. Most involved egregious, sadistic violence: multiple murders or attempts, slashings, mocking helpless victims in the last seconds of their lives. In every one, there was a substantial period of time in which the victim was terrified, confronting an armed man obviously intent on violence. None of these offenses can therefore be said to be "comparable" to that of Steve Roach.

Petitioner and his counsel are confident that this Court will not hear in this submission any disrespect for the life of the person he was convicted of killing, or any minimization of the impact of her death on her family and community. The point is that, for a proportionality review to accord with the due process rights of a convicted capital murder defendant, more must be said than that he is a killer, and that his deed

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[4]Also in the record is a chart reflecting the 58 individuals convicted in Virginia of capital murder in theft cases, but sentenced to life imprisonment. Perhaps some of these are the cases whose records the Virginia court "also reviewed": there is no way of knowing. It is hard to find in this list of individuals **not** sentenced to death, even **one** whose history of violence was less substantial than Petitioner's. Moreover, 58/74 = 78% of apparently comparable defendants were sentenced to life and only 16/74 = 22% to death. Even if the court identified the proper "universe of comparables," it is impossible to infer that Virginia juries "generally" impose death sentences on defendants like Petitioner.

[5]Although Virginia law expressly includes the defendant's age as a matter the jury may consider in mitigation, Va. Code § 17-110(C)(2), that the Commonwealth Supreme Court considered Petitioner's case to be most "comparable" to those of a set of offenders all of whom were over 18 further undermines the reliability of its proportionality analysis.

shows contempt for human life. The Supreme Court of Virginia said that it had reviewed the available data, and from them inferred that "juries in this Commonwealth generally impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes." **But no actual review of those cases, no actual assay of comparable defendants and comparable crimes, can have led to that conclusion.**[6]

Petitioner respectfully submits not that the Virginia Supreme Court performed the analysis assigned to it by State law incorrectly or inadequately, but that it did not do it at all. A determination of proportionality entails **comparison**: evaluating the defendant and the crime alongside other materially similar defendants and crimes. The Commonwealth court cannot have performed such an analysis in this case and reached the result that it did, since on both of the relevant criteria – the defendant's record of violence and the sheer badness of the criminal offense – this case is unique in the annals of Virginia death penalty jurisprudence.

The death penalty sentencing process established by the Virginia General Assembly directs that State's Supreme Court to evaluate each **defendant** and his sentence, *inter alia* in relation to similar **defendants** in similar situations. *See* Va. Code § 17-110(C)(2). This is within the range of sound constitutional practice. *Pulley*, 465 U.S. 37, 43. Steve Roach's record contains far less indication of propensity to violent criminality than that of any person ever sentenced to death in Virginia since capital punishment was reinstated in 1977. And the act of killing Mary Hughes, however reprehensible, involved no more violence than what was required to come within the definition of capital murder. Thus on **both** of the

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[6]The court below taxed Petitioner with asking it to "look behind" the State court's review. App. 11a. This is **exactly** what Petitioner seeks, since he contends that he has a constitutional right to actual due process, not to a mere recitation that due process has been granted. Even if the Constitution does not require such a review, *Walton v. Arizona*, 487 U.S. 639, 656 (1990), it assuredly does not preclude it.

scales laid down by statute as the "subject matter" of the required proportionality analysis, this case is at or beyond the extremes of those cases with which comparison is to be conducted.[7]

But the Virginia court limited its consideration to whether Petitioner's punishment was justified by the crime he was convicted of committing. *Id.* This is not the proportionality review required by State law, and violated Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution.[8]

The denial of Petitioner's due process right to an actual comparison of his record and his crime to others similarly situated (whether the outcome is favorable to him or not) is unfortunately not unique. Between 1977 and the affirmance of Roach's sentence on March 1, 1996, the Virginia Supreme Court has affirmed death verdicts against 95 individuals, including some affirmed more than once. And it had never until that time found, even once, that a death sentence was excessive or disproportionate. "Proportionality review," that is, had never removed a Virginia defendant from death row.

The Virginia court's steadfast refusal to reverse any death verdicts thwarts Justice White's prediction in *Gregg v. Georgia* that, over time, as aggravating circumstances requirements were applied, "the types of murder for which the death penalty may be imposed [would] become more narrowly

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[7]In *Solem v. Helm*, 463 U.S. 277, 289 (1983), this Court approved the following factors to analyze whether a sentence is proportionate "to the crime for which the defendant has been convicted" under a repeat offender statute: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other defendants convicted in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 290-94.

[8]*Pulley v. Harris*, 465 U.S. at 54-59 (Stevens, J., concurring); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242, 251 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Zant v. Stephens*, 462 U.S. 862, 876-77 and n.15 (1983).

defined and [would be] limited to those which are particularly serious or for which the death penalty is peculiarly appropriate." 428 U.S. 153, 222 (1976). The opposite has occurred in Virginia; the opposite has occurred in this case. The death sentence imposed on Petitioner is so disproportionate to the outcomes in other comparable cases in Virginia that it cannot be justified in that manner.

The approach of the Virginia Supreme Court is constitutionally flawed. Since nearly **every** combination of predicate offenses and aggravating factors has produced at least **one** affirmed death sentence, apparently sufficient to sustain conclusions about what juries "generally" do, the court cannot **ever** find a death sentence to be disproportionate. Nor did it even take into account Petitioner's confession or the remorse that he expressed for Mary Hughes's death, although in a number of "comparable" cases, **lack** of remorse was expressly held relevant to the court's affirmance of death sentences.[9]

The Virginia court, during its perfunctory review, never stated how Roach and his crime resembled the 16 death-affirmed cases it apparently considered comparable, but not the 58 cases resulting in life sentences.[10] Because the court failed to do so, simply stating its conclusion as an empirical matter

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[9] *See, e.g., Murphy v. Commonwealth*, 246 Va. 136, 146 (1993); *Thomas v. Commonwealth*, 244 Va. 1, 24-25 (1992); *Clark v. Commonwealth*, 220 Va. 201, 210-11 (1979); *Saunders v. Commonwealth*, 242 Va. 107, 116 (1991); *Williams v. Commonwealth*, 234 Va. 168, 181-82 (1987); *Beaver v. Commonwealth*, 232 Va. 521, 536 (1987); *Strickler v. Commonwealth*, 241 Va. 482, 497 (1991); *Frye v. Commonwealth*, 231 Va. 370, 393 (1986).

[10] In fact, the court has never articulated a basis for comparison among cases, even when it has expressly mentioned specific ones in which capital punishment was not decreed (as it did not do here). *See, e.g., Joseph v. Commonwealth*, 249 Va. 78, 93 (1995); *Chandler v. Commonwealth*, 249 Va. 270, 284 (1995).

with no citation to evidence or precedent, Petitioner did not receive meaningful review of the propriety of his death sentence. *Parker v. Dugger*, 498 U.S. 302 (1991). A proportionality review must consider all relevant factors relating to the defendant as well as the crime, including those that might mitigate the offense or the offender's moral responsibility, as well as the array of outcomes in other cases. *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Tuggle v. Netherland*, 516 U.S. 10 (1993). This was not done, with the inevitable results.

2. The Evidence Submitted to the Jury at the Sentencing Phase Was Insufficient as a Matter of Constitutional Right to Justify a Sentence of Death on the Grounds of Future Dangerousness.

A Virginia jury must find at least one of two aggravating circumstances before it can impose a sentence of death:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Va. Code § 19.2-264.4(C) (Michie 1995). Not only did the Commonwealth present evidence inadequate as a matter of law to support a finding of future dangerousness in this case, but the evidence that it attempted to muster was insufficient, as a matter of law, for the trial court even to have allowed the jury

to consider the issue in the first place. The inadequacy of the evidence constituted a denial of Petitioner's right to a fair trial.

The statute dictates that the jury may not impose a sentence of death unless it finds a probability of future dangerousness after consideration of **the defendant's past criminal record of convictions**. *Id.*, § 19.2-264.2. Although inferences may be drawn from the circumstances of the criminal act for which the defendant is on trial, the law does not permit future dangerousness to be determined based on that single crime alone.

Steve Roach was convicted and sentenced for having committed a terrible act. At the same time, however, it is important to recognize that, just as there are degrees of homicide crimes, there are degrees of capital murder. The very existence of the vileness aggravator as one of the means of supporting a death sentence constitutes recognition of gradations attending even such grievous crimes. To pass the vileness threshold, Virginia courts have required conduct "more culpable than the minimum necessary to accomplish an act of murder." *Edmonds v. Commonwealth*, 229 Va. 303, 313 (1985), citing *Smith v. Commonwealth*, 248 S.E. 2d 135, 149 (1978), *cert. den.*, 441 U.S. 967 (1979).

The circumstances surrounding this murder cannot support a capital sentence. Ms. Hughes was shot a single time. She was not sexually assaulted or physically abused in any other way. There was no struggle, and no evidence that she suffered before or after she was shot. She was the only victim. Although the shooting was, in and of itself, a terrible thing, it was "the minimum necessary to accomplish an act of murder." *Edmonds*, 229 Va. at 313.

None of Steve Roach's juvenile offenses prior to the killing of Mary Hughes involved violence, controlled

substances, or the use or threatened use of a weapon.[11] This paltry record cannot support a finding of the likelihood that Petitioner "would commit criminal acts of violence that would constitute a continuing serious threat to society."

In stark contrast are those reported cases in which the evidence was found, on appeal, to be sufficient to support a finding of future dangerousness. Each involved a history of significant criminal activity, and a pattern of horrific violence. *See, e.g., Hoke v. Commonwealth*, 377 S.E.2d 595, 600-01 (1989), *cert. den.*, 491 U.S. 910 (1989), and 502 U.S. 880 (1991) (attempted arson, carrying a concealed weapon, "assaults, jump[ing] people, beat[ing] them with things just to collect money together for a dope deal or something"); *Royal v. Commonwealth*, 458 S.E.2d 575, 576 (1995), *cert. den.*, 116 S.Ct. 823 (1996) (assault and battery, interfering with a police officer, possession of cocaine); *Edmonds v. Commonwealth*, 329 S.E.2d 807, 814 (1985), *cert. den.*, 474 U.S. 975 (1985) ("going after his girl with an ax," "cutting" someone, five convictions for assault and battery); *Poyner v. Commonwealth*, 229 Va. 401, 427, 329 S.E.2d. 815, 833 (1985), *cert. den.*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985) (19 convictions, including assault on a police officer, three capital murders, robbery, use of a firearm); *Spencer v. Commonwealth*, 393 S.E.2d 609, 622 (1990), *cert. den.*, 498 U.S. 908 (1990) (three similar murders); *see also Wright v. Commonwealth*, 427 S.E.2d 379, 393 (1993), *cert. granted on other grounds*, 512 U.S. 1217 (1994), 450 S.E.2d 361 (1994), *cert. den.*, 514 U.S. 1085 (1995) (17-year-old defendant, with prior convictions for first degree murder and attempted first degree murder, committed another murder during an attempted rape).

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[11]The record indicates that he violated the terms of his probation also by possessing a gun. Interestingly, however, the Greene County Sheriff's Office itself returned the gun to him just days before the shooting, after Roach had voluntarily surrendered it. In Greene County, apparently, firearm possession is a parole violation so technical that it is not even noticed by the police.

Steve Roach's scant record simply cannot justify assimilating him to these violent and dangerous men.

No witness offered **any** testimony supporting the contention that Petitioner had a propensity to be dangerous. Even the man whose house Petitioner had burglarized offered no suggestion that he saw Roach as any sort of threat, let alone "a continuing serious threat to society."

The Commonwealth put on no other evidence during the sentencing phase. Even the trial judge, while denying the defense motion to keep the future dangerousness aggravator from the jury, acknowledged on the record that the Commonwealth's case was extremely weak.

Since the Commonwealth was not permitted to argue that the circumstances of Mary Hughes's murder gave rise to the vileness predicate, the case for the execution of Steve Roach turned entirely on its ability to find in a record of juvenile delinquency a continuing, serious threat of criminal acts of violence posing a future danger to society. No evidence was introduced to support that claim, however, and it is unsupportable as a matter of law.

3. Petitioner Was Denied Constitutional Due Process Rights When His Sentencing Jury Was Not Permitted to Know the Alternative to the Death Penalty.

During the penalty phase of Petitioner's trial the Court instructed the jury, *inter alia*:

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravated circumstance, that after consideration of his history and background, there is probability that he **would** commit criminal acts of violence that **would** constitute a continuing serious threat to society.

Emphasis added. Immediately following instructions, a juror posed a question, which was read aloud to counsel in the absence of the jury: "Does life in prison mean with no chance of parole or truly life in prison, or is he eligible for parole?"

The trial court further instructed the jury as follows:

> The question, does life in prison mean with no chance of parole, or truly life in prison, or is he eligible for parole? . . . Having found the defendant guilty, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

Essentially, the court refused to answer the juror's question, although at least that juror recognized that a decision concerning the penalty of death, turning on evidence of future dangerousness, depended upon a premise which had been left unspoken: what would be the conditions of Petitioner's life were he allowed to live? The juror wanted to know what the judge and counsel for both sides already knew: that a sentence of life imprisonment for Steve Roach would preclude eligibility for parole until 25 years had passed.

In *Graham v. Collins*, 506 U.S. 461 (1993), Justice Souter, in dissent, warned of the quagmire that might result from such an incomplete staging of instructions during the penalty phase of a trial following conviction of a capital offense, when future dangerousness is at issue. He noted

> that the trial judge's remarks at voir dire may have inappropriately left the jury to consider whether Graham would have been dangerous in the future **if he were set free.** . . . In light of my conclusion that Graham's death sentence should be vacated, I need not address here the propriety of sentence imposed on the basis of future dangerousness to the public when there

> is no possibility that a defendant will be sentenced to a term less than life without the possibility of parole.

506 U.S. at 518 n. 10 (Souter, J., dissenting).[12]

One term after *Graham*, this Court in *Simmons v. South Carolina*, 512 U.S. 154 (1994), considered a capital case from a State which, unlike Virginia at the time, provided by statute for the sentence of "life without parole."[13] Simmons's prosecutors successfully sought the death penalty on the grounds of a future dangerousness aggravator similar to Virginia's. Justice Blackmun, with three Justices concurring and three concurring in the judgment, wrote:

> The Due Process Clause does **not** allow the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349 at 362 (1977). In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberation, it had the effect of creating **a false choice** between sentencing petitioner to death and sentencing him to a limited period of incarceration. This **grievous misperception** was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's

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[12] *Graham* was a Texas case, and Texas law has no sentence of "life without parole." Justice Souter's reference to there being "no possibility" of a term less than life without parole, therefore, cannot be limited to cases with no **legal** chance of such a sanction, but must refer to the **factual** improbability of its being imposed.

[13] Virginia law was amended in 1994 to abolish parole for capital offenses committed after January 1, 1995. Va. Code § 53.1-165.1

> parole ineligibility and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed. . . . The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its non-capital sentencing alternative, namely, that life imprisonment meant life without parole. **We think it is clear that the State denied petitioner due process.**

512 U.S. at 161-62 (emphasis added).

Justice Souter, concurring, found additional support in the Court's consistent interpretation of the Eighth Amendment, to the effect that accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant should be put to death or allowed to live in prison, citing *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). He further reasoned:

> That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences. . . . Thus, whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been "arbitrarily or capriciously" and "wantonly and . . . freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 249 (Douglas, J., concurring).

Simmons, 512 U.S. at 172 (Souter, J., concurring). The requirement that instructions in capital cases need to be especially clear is a further illumination of the basic principles

set down in *Bollenbach v. United States*, 326 U.S. 607, 613 (1946), in which this Court held that "[c]onviction ought not to rest on an equivocal direction to the jury on a basic issue."

Here, the basic and only issue at the sentencing phase was the "probability of future dangerousness." Yet the jury was not to learn the fact that, were they to allow Roach to live, he would have no contact with society outside prison for at least 25 years. Nor is this of merely theoretical interest: the question that the judge refused to answer indicates its importance to at least one juror, and probably to more.

Simmons demonstrates that the term "future dangerousness," in capital sentencing schemes like Virginia's, is actually a misnomer: Petitioner's jury could not reasonably answer questions about the "future" of the person to be sentenced without more information than they were given.

The anomaly of reading *Simmons* as requiring the statutory availability of the sentence of life without parole is clearly seen by contrasting *Simmons* itself with the case at Bar. In *Simmons*, the defendant had a right to have his sentencing jury know that, if not executed, he would spend the rest of his life behind bars. Here, Respondent would have the Court conclude that the failure to inform the jury of Petitioner's parole ineligibility for a minimum of 25 years entails no denial of due process. Yet the alternative sentences in the cases of Simmons and Roach are far more similar than different.

Both Simmons and Roach, if allowed to live, would spend the next quarter-century in prison: the South Carolina and Virginia statutory schemes treat them identically for that period of time. The difference arises only after the 25-year minimum term in Virginia is elapsed. On the first day of the 26th year following his sentence, Roach might[14] be set free; Simmons would surely wake up to another day behind bars.

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[14]The 25 year term of ineligibility does not mean, of course, that a life-sentenced inmate will always be released after 25 years, but merely that

So the difference between Simmons and Roach, in terms of the predicate for future dangerousness, is only with respect to what might happen in prison, for the first 25 years from sentencing, and outside only thereafter. The deliberating jury did not actually consider whether Petitioner "would" be a future danger to society during or after a term of 25 years behind bars. Virginia's argument was that Petitioner was dangerous now, not that he would be as a middle-aged man, well after the year 2015.

By statute, the Commonwealth's burden is to prove beyond a reasonable doubt "that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society." In any capital case, reasonable jurors may understand the question they must answer in dramatically different ways. Would he commit criminal acts of violence and constitute a continuing threat to society: (a) if given the opportunity to re-enter society at large, and to act without fear of apprehension? (b) if put back in the precise circumstances of his crime? (c) if locked behind bars for all or most of the rest of his life? or (d) if sentenced to prison for life and if provided treatment (or is he beyond redemption in this life)?

No guidance among these radically different understandings was tendered to the jury by Judge Sullenberger. Yet the gulf that separates interpretations (a) and (d), for example, is so wide that even a "unanimous" affirmative answer to the question does not imply the "certainty that the verdict rested on proper grounds" required by the Constitution. *See, e.g., Mills*, 486 U.S. at 376. Under *Boyde v. California*, 494 U.S. 370, 380 (1990), and its progeny, a reasonable likelihood of divergent application of standards is sufficient to sustain the conclusion that due process has been

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he can qualify for parole in the normal manner. In fact, it is extremely uncommon for capital murder defendants to obtain parole at or shortly after the time they become technically eligible.

denied. And such a likelihood is present here, as the language of the question put to the jury itself reveals.

It is true that certain State courts, including the Supreme Court of Virginia,[15] and at least the Fourth and Fifth Circuits, *Wilson v. Greene*, 155 F.3d 396 (4th Cir. 1998), *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994), *cert. den.*, 514 U.S. 1108 (1995), have read *Simmons* as limited to cases in which a defendant is ineligible for parole forever, as a matter of law.

This strained interpretation finds authority in but a single sentence -- indeed, a single word – of the plurality opinion. Justice Blackmun wrote: "The logic and effectiveness of petitioner's argument naturally depended on the fact that he was **legally** ineligible for parole and thus would remain in prison if afforded a life sentence." 512 U.S. at 165 (emphasis added).[16] But it is hard to see why the legal rather than the factual reasons for the defendant's parole ineligibility should be determinative. What Simmons – and what Roach here – sought to show was simply that he would be behind bars and not on the streets: forever in the case of *Simmons*, and for a very long time in the case at Bar. Future dangerousness, in either instance, has to be assessed on real assumptions, not on the false premise that the convicted defendant might soon return to the general public.

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[15]Not all State courts have thus erred in interpreting *Simmons*, however. The Supreme Court of New Mexico, in *Clark v. Tansy*, 882 P.2d 527 (N.M. 1994), held that a capital defendant has the right to have the jury accurately informed of the actual length of the prison term that would be alternative to death, including even such conditional factors as "good time."

[16] In *Wilson*, 155 F.3d at 407, and below, App. 16a-18a, the Fourth Circuit purported to find authority for its narrow reading of *Simmons* in the opinion of O'Connor, J., on behalf of herself and two other Justices. But the repeated reference to Simmons's parole ineligibility as a matter of law in the O'Connor opinion merely reflected the record before the Court in that case. Nowhere did Justice O'Connor suggest that the legal, as opposed to factual, impossibility of parole for Simmons was the deciding factor.

Simmons was addressed by the Supreme Court of Virginia on direct appeal, but that court regrettably misinterpreted its import, centering its conclusion on the distinction between Roach's theoretical "eligibility" for parole (albeit after a quarter of a century), and Simmons's permanent "ineligibility" as a matter of law. *Roach*, 468 S.E.2d 98 (1996). The Virginia court did not indicate why this is relevant to the issue of future dangerousness, even though the fact that Roach would be under 24-hour armed guard for a minimum of 25 years is not. Nor did it explain why "the effect incarceration might have on Roach" was a subject of "**improper** speculation," while speculation about future dangerousness in the abstract, counterfactually divorced from awareness of the real alternative to death, apparently is "proper."

Petitioner seeks here an interpretation of *Simmons* consistent with its logic and true to its premises. Justice Stevens and three other Justices recently indicated, in *Brown v. Texas*, 118 S.Ct. 355 (1997) (*mem.*), that in their view, *Simmons* has been misconstrued in State and circuit court decisions. In *Brown*, the alternative sentence for the capital defendant was a minimum of 35 years in prison without parole. Like Roach, he sought to let the jury know this fact. And like Judge Sullenberger, Brown's trial judge refused to give this information to the jury.

In a "memorandum respecting the denial of a petition for a writ of certiorari," Justice Stevens noted that "[t]here is an obvious tension between this rule and our basic holding" in *Simmons*. He described the Texas (and Virginia) rule as "**perverse**," and stated that it "**unquestionably** tips the scales in favor of a death sentence that a fully informed jury might not impose." *Id.*, at 356, emphasis added.

Justice Stevens backed up this conclusion not only by appeal to the logic of *Simmons* itself, but also by empirical data that show how much more likely it is that a jury will let a defendant live if there is no chance of his emerging from

prison anytime soon.[17] As Justice Scalia noted in his dissent in *Simmons*, the difference between a long term of imprisonment and total parole ineligibility is a difference of degree, not of kind. *Simmons*, 512 U.S. 154 at 179-80 (Scalia, J., dissenting). Justice Stevens suggested that the circuit courts should develop additional jurisprudence in this area before this Court's inevitable review.[18] Petitioner respectfully submits that the matter is now ripe.

Petitioner respectfully submits that, under the logic of *Simmons*, his jury should have been permitted to know that a "life" sentence in his case would mean no less than 25 years, and that the 19-year-old teenager before them would be a 44-year-old man before he had any chance of release into society if they were to let him live.[19] Withholding that information

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[17]Public support for the death penalty drops by as much as half when imprisonment with a long period of parole ineligibility is the alternative. Bowers, Vandiver, & Dugan, "A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer," 22 Am. J. Crim. L. 77 (1994). A substantial portion of the jury-eligible population of the Commonwealth believes that rigorous sentences are routinely reduced or waived, and that "life" sentences are actually very brief. Note, "The Meaning of 'Life' for Virginia Jurors and Its Effect on Reliability in Capital Sentencing," 75 Virginia Law Rev. 1605, 1636 (1989).

[18]The Tenth Circuit has opined that Petitioner's reading of *Simmons* is now "arguable," after *Brown*, although it declined to go along with the argument of a petitioner who was sentenced before Simmons. *Moore v. Reynolds*, 153 F.3d 1086 (10th Cir. 1998), *cert. den.*, 119 S. Ct. 1266 (1999). Moreover, at least one Judge of the Fourth Circuit has opined that his colleagues' view of *Simmons* and its progeny is "wrong," and that its import is an open question. *Wilson*, 155 F.3d 396, 417 (Michael, J., concurring in the judgment).

[19]That some jurors might have attempted to divine the future dangerousness of Steve Roach on the impossible assumption that he would be out of prison directly, while others thought in terms of his overpowering a guard in his maximum security cell, obtaining a firearm, and committing acts of violence within the prison, itself leads to the conclusion that the "future dangerousness" determination is inherently unreliable, in precisely the way prohibited in *Woodson v. North Carolina*, 428 U.S. 280 (1976).

from the jury systematically ensured that they were "clearly misinformed" "about the real implications of their sentencing alternatives."

It is well settled that jurors may be asked to look into the future, but to determine probabilities in an informed manner, they must understand those conditions of the future that are fixed. This Court, in *Jurek v. Texas*, noted that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." 428 U.S. at 274. A sentencing jury in a capital case must be able to consider "[t]he defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society." *California v. Ramos*, 463 U.S. 992 (1983).

It is more probable than not that at least one juror believed that Steve Roach, if allowed to live, would be eligible for parole within a few years. The reasonable likelihood of such a misunderstanding means that his sentence violated Petitioner's right to the due process of law. *See Boyde v. California*, 494 U.S. 370 (1990). That alone means that the reliability of the death sentence was and is significantly diminished. *See Beck v. Alabama*, 447 U.S. 625, 638 (1980).

"To give the jury an instruction in the form of . . . words that are hopelessly ambiguous . . . would effectively grant it an unbridled discretion to impose the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 437 (1980) (Marshall, J., concurring). Such unregulated power is unconstitutional. *Furman v. Georgia*, 408 U.S. 238 (1972). A sentence delivered on the basis of such an instruction must be set aside.

4. Petitioner Was Denied His Constitutional Right to a Fair Trial When the Judge Erroneously Instructed the Jury at the Sentencing Stage About the Need for Unanimity and the Consequences of Failure to Achieve It.

The trial court also erred seriously in its charge to the jury at the sentencing phase. After testimony in support and in

rebuttal of the "future dangerousness aggravator," the Judge instructed the jury on the deliberation process. His instructions were inconsistent with Virginia law, and denied Petitioner fundamental constitutional rights.

After explaining that the Commonwealth must prove beyond a reasonable doubt the premise of the "future dangerousness" aggravator, Judge Sullenberger told the jury:

> if the Commonwealth has failed to prove that circumstance beyond a reasonable doubt, then you shall fix the punishment of the defendant at, one, imprisonment for life, or two, imprisonment for life and a fine for a specific amount, but not more than $100,000. **Any decision you make regarding punishment must be unanimous.**

Emphasis added. Under the statute, however, the jury must agree unanimously on a death sentence, while on a failure of unanimity, the sentence is life. Va. Code § 19.2-264.4(E). The instruction that "[a]ny decision you make regarding punishment must be unanimous" is absolutely unfounded in the law of Virginia, and is an error of Constitutional dimension.

As Justice Blackmun wrote for this Court in *Mills v. Maryland*, 486 U.S. 367 (1988):

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.

486 U.S. at 383-4. The "possibility" to which Justice Blackmun alluded in *Mills* is here a probability, since jurors were instructed that to find mitigation they had to be unanimous.

The few Virginia cases expressly on point are clear and univocal in their agreement: State law makes life imprisonment the "default option," automatically imposed if the jury cannot agree unanimously on death. *Eaton v. Commonwealth*, 397 S.E.2d 385, 398 (1990), *cert. den.*, 502 U.S. 824 (1991). The instruction in this case reversed the burden of proof, and told the jury that Petitioner had to persuade all of them that one or more mitigating factors obtained. Such a reversal is unconstitutional. This Court "has held that, where the underlying statute does not require unanimity, due process will not tolerate instructions that could reasonably be interpreted by a jury to preclude consideration of any mitigating factor unless such factor was unanimously found to exist." *Mak v. Blodgett*, 970 F.2d 614, 625 (9th Cir. 1992).

In *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Court struck down a North Carolina sentencing scheme requiring jury unanimity to determine mitigating factors. It rejected a false symmetry: that the State must prove aggravating factors to a unanimous jury does not mean that the defendant has to carry the same burden on mitigation. *McKoy*, 494 U.S. at 442-444; *Perry v. Lynaugh*, 492 U.S. 302, 327-28 (1989). Justice Blackmun, concurring in *McKoy*, explained *Mills* further: the "instructions were held to be invalid because they were **susceptible** of two plausible interpretations, **and under one of those interpretations the instructions were unconstitutional.**" 494 U.S. at 445 (Blackmun, J., concurring) (emphasis in original).

Mills and *McKoy* concerned jury instructions which insisted on unanimity as to a particular circumstance of mitigation, rather than as to the presence of any mitigating factor. But the result is that a sentencing scheme may not constitutionally impose on the defendant the burden of persuading all 12 jurors that he does not deserve to die. That is

precisely what Petitioner's jury was told. Just as in *Lockett v. Ohio*, 438 U.S. 586 (1978), the risk that the penalty imposed here was erroneous demands resentencing.

This is not a case like *Komahrens v. Evatt*, 66 F.3d 1350, 1364 (4th Cir. 1995), *cert. den.*, 116 S.Ct. 1575 (1996), or *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997), *cert. den.*, 118 S.Ct. 715 (1998). There, the court of appeals held specifically that a reasonable jury could not have inferred the need to find mitigating factors unanimously. Petitioner's jury was told that any decision it reached -- that is, for death or for life – had to be unanimous. This cannot be reconciled with the teachings of this Court in *Mills* and *McKoy*.

Nor does this case resemble *DeLong v. Thompson*, 790 F. Supp. 594 (E.D. Va. 1991), *aff'd* (*mem.*), 985 F.2d 553 (4th Cir. 1993). In *DeLong*, there was no constitutional violation, because the jury was "expressly informed . . . that the decision to impose the death sentence had to be unanimous." Then it was told: "[W]hen I say that you must be unanimous, you must be unanimous if you impose the death penalty. Anything short of unanimous is life imprisonment." 790 F. Supp. at 610. The information given to the *DeLong* jury was precisely what was withheld here: that unless each was affirmatively persuaded, beyond a reasonable doubt, that the defendant merited execution, he would be sentenced to life in prison. Unlike *DeLong*, this case presents the very "possibility that petitioner's jury conducted its task improperly" that this Court in *Mills* found to be "certainly . . . great enough to require resentencing." 486 U.S. 367, 384 (1988).

This argument is in no way precluded by the recent decision of this Court in *Jones v. United States*, 119 S. Ct. 2090 (1999). In that case, interpreting the death penalty provisions of Federal law, 18 U.S.C. § 3594, Justice Thomas opined for a 5-4 Court that an error similar to that of Judge Sullenberger did not raise constitutional issues. That conclusion was premised, however, on the fact that "[t]here is no reasonable likelihood that the jury applied the instructions incorrectly." 119 S. Ct. at

2103. The Court found that, as a matter of probability, no one was misled: the petitioner's view was based on inference, and negative inference at that. Here, by contrast, the error of law was express, and the room for misunderstanding obvious.

5. Petitioner, Aged under 18 at the Time of His Arrest, Was Denied His Constitutional Right to an Individualized Assessment of His Maturity before Being Transferred for Trial as an Adult.

American law has long recognized the fundamental differences to be accommodated in determining the rights and obligations of children, especially in the context of criminal law. *See New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985). In the law's eyes, children are less experienced and more impetuous than adults, and are not as able to evaluate the consequences of their conduct. They are, therefore, in general less blameworthy for their transgressions, in the literal sense of the word. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).

To pass constitutional muster, a State's laws must provide a fair basis for evaluating the juvenile's culpability, responsibility, and maturity before having him tried as an adult. That determination must provide "individual consideration," a "constitutional requirement." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *see also Stanford v. Kentucky*, 492 U.S. 361 (1989); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Bellotti v. Baird*, 443 U.S. 622 (1979). The Eighth Amendment, applicable to the States through the Fourteenth, prohibits the infliction of "cruel and unusual punishment," understood according to the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

"Individualized consideration," of course, is a constitutional requirement in all criminal cases, not just those that might result in a sentence of death, and not just those involving juveniles. *Lockett*, 438 U.S. 586, 605; *Zant v. Stephens*, 462 U.S. 862, 879 (1983). But it is particularly essential in cases of young offenders facing execution.

This Court has mandated this individualized analysis in juvenile cases prior to the decision to transfer the case to adult court. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court noted that "the determination required by juvenile transfer statutes to certify a juvenile for trial as an adult ensures individualized consideration of the maturity and moral responsibility of 16- and 17-year-old offenders before they are even held to stand trial as adults." *Stanford*, at 375.

Under Virginia's statute in effect at the time of Petitioner's transfer, the juvenile court had to find only probable cause to believe that he had committed the delinquent act as alleged. Va. Code § 16.1-269 (Michie 1994).[20] Yet the death penalty, "unique in its severity and irrevocability," is an excessive and constitutionally unacceptable punishment for a juvenile who lacks an adult's maturity and blameworthiness. *Gregg v. Georgia*, 428 U.S. 153, 197 (1976).

An individualized evaluation of blameworthiness, rather than an expression of abhorrence at the crime, was missing in this case. The juvenile court based the transfer only on the seriousness of the offense and the inability of the juvenile justice system to incarcerate Petitioner for a long period of time. Such a transfer cannot be reconciled with the teachings of this Court, for example in *Stanford*, at 375.[21]

CONCLUSION

For all of the foregoing reasons, Petitioner Steve Edward Roach respectfully prays that a writ of certiorari be issued by this Court to the United States Court of Appeals for the Fourth Circuit, and that the opinion of that court be reversed.

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[20]This statute was repealed in 1994, after the proceedings at issue in this case.

[21]While Virginia allows for consideration of age as a mitigating factor, Virginia Code § 19.2-264.4 (B), no instruction regarding age was given at trial.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the 4th Circuit

Opinion of the Virginia Supreme Court

Denial of Petition for Writ of Certiorari (1996)

Denial of Petition for Writ of Certiorari (1998)

Opinion of the United States District Court for the Western District of Virginia

Denial of Petition for Rehearing in the United States Court of Appeals for the 4th Circuit

Order Setting Date of Execution

Order Awarding Appeal from the Circuit Court of Greene County

Order Granting Stay of Execution

28 USC § 2254

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

STEVE EDWARD ROACH,
Petitioner-Appellant,

v.

No. 98-26

RONALD ANGELONE, Director,
Virginia Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Samuel G. Wilson, Chief District Judge.
(CA-97-693-R)

Argued: March 3, 1999

Decided: May 4, 1999

Before WIDENER, NIEMEYER, and KING, Circuit Judges.

Certificate of appealability denied and appeal dismissed by published opinion. Judge King wrote the opinion, in which Judge Widener and Judge Niemeyer concurred.

COUNSEL

ARGUED: Steven Marc Schneebaum, PATTON BOGGS, L.L.P., Washington, D.C., for Appellant. Robert Quentin Harris, Assistant Attorney General, OFFICE OF THE

ATTORNEY GENERAL, Richmond, Virginia, for Appellee. ON BRIEF: Benjamin G. Chew, Willa B. Perlmutter, Susan M. Mathiascheck, PATTON BOGGS, L.L.P., Washington, D.C., for Appellant. Mark L. Earley, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

OPINION

KING, Circuit Judge:

In 1995, Steve Edward Roach ("Roach"), was convicted of capital murder in the State of Virginia and sentenced to death. In 1996, the Supreme Court of Virginia affirmed the sentence, Roach v. Commonwealth, 468 S.E.2d 98 (Va. 1996), and the Supreme Court of the United States denied certiorari. Roach v. Virginia, 519 U.S. 951 (1996). Upon exhausting his state collateral remedies, Roach petitioned the United States District Court for the Western District of Virginia for a writ of habeas corpus. See 28 U.S.C.A. § 2254 (West Supp. 1998). After reviewing the parties' legal arguments and conducting an evidentiary hearing, the district court, on July 29, 1998, denied habeas corpus relief.

Roach has appealed to this court, pursuant to 28 U.S.C. § 1291, from the final order of the district court. In addition, Roach has filed with us a petition for a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)[1] and Fed. R. App. P. 22. On

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[1] 28 U.S.C. § 2253(c) provides, in pertinent part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State Court . . . .

appeal, Roach raises five issues that he claims warrant habeas relief. After careful consideration of each of Roach's contentions and the entire record, we find that Roach has failed to make a substantial showing of the denial of a constitutional right and that there is no basis for federal habeas corpus relief. Accordingly, we deny the petition for a certificate of appealability and dismiss the appeal.

I.

On December 3, 1993, Mary Ann Hughes ("Mrs. Hughes") was shot and killed in her home. The cause of death was a single shotgun blast to the chest. Mrs. Hughes's purse, containing her credit card and approximately sixty dollars in cash, and her 1981 Buick Regal were stolen. During the early morning hours of December 4, 1993, a Nottoway County deputy sheriff observed Mrs. Hughes's automobile parked in the parking lot of a shopping center in Blackstone, Virginia. The deputy subsequently identified Roach as the driver of the car. Later that same morning, Roach was videotaped while attempting to use Mrs. Hughes's credit card at an automated teller machine in Louisburg, North Carolina.

On December 5, 1993, a South Carolina State Trooper observed Mrs. Hughes's automobile traveling at an excessive rate of speed. When the trooper attempted to detain the vehicle, the driver stopped the car on the left shoulder of the road and escaped into the adjacent woods. The driver's clothes matched the description of the clothes Roach was observed wearing on the night of the murder.

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(2) A certificate of appealability may issue . .. only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C.A. § 2253 (West 1996). The showing which Roach is required to make in order to obtain a certificate of appealability under 28 U.S.C. § 2253, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), has not changed from the showing required of habeas corpus petitioners prior to 1996. See Mackall v. Angelone, 131 F.3d 442, 444, n.3 (4th Cir. 1997), cert. denied , 118 S.Ct. 907 (1998).

The items retrieved from the vehicle included Mrs. Hughes's purse, a blue jacket, a number eight load shotgun shell, and a plastic bag from a Winn-Dixie grocery store. Roach's latent palm prints and fingerprints were also recovered from the interior of the automobile.

On December 6, 1993, Roach returned to the Commonwealth of Virginia and voluntarily surrendered to Sheriff William Morris for questioning. During questioning, Roach initially attempted to deny his involvement in the murder and theft and implicate others. However, when presented with evidence independently gathered by police, Roach confessed to the crimes. Roach told the Sheriff:

> I went over there and saw her counting the money and as I was leaving, I had the shotgun laying at the door and I shot her, took the money, the car and left, went to North Carolina. And I cashed –I tried to use –use the credit card but-about four times[,] but it wouldn't work.

Roach v. Commonwealth at 103.

Because Roach was seventeen years old at the time of the murder of Mrs. Hughes, juvenile petitions were issued charging him with murder, using a firearm in the commission of murder, and robbery. The Commonwealth gave notice of its intent to try Roach as an adult and a transfer hearing was held in the juvenile court. The juvenile court found probable cause to believe that Roach committed the crimes and advised the Commonwealth's attorney that he could seek indictments against Roach before a grand jury.[2]

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[2] At the time of Roach's indictment and trial, transfers from the juvenile court system to the circuit court system were controlled by Va. Code § 16.1-269. Under that statute, the juvenile court was required to determine only if there was probable cause to believe Roach had committed an offense that would be a felony had it been committed by an adult. Va. Code

Roach was indicted and tried on charges of (1) capital murder of Mrs. Hughes in the commission of robbery while armed with a deadly weapon, in violation of Va. Code § 18.2-31(4); (2) use of a firearm in the commission of murder in violation of Va. Code § 18.2-53. 1; and (3) robbery by violence to the person of Mrs. Hughes, in violation of Va. Code § 18.2-58. The jury found Roach guilty on all three charges and the Commonwealth sought the death penalty.

In order to lawfully sentence a convicted defendant to death in Virginia, a jury must unanimously find, beyond a reasonable doubt, the presence of one of two aggravating factors. See Va. Code § 19.2-264.2 (Michie 1977). Those aggravating factors are colloquially known as the "future dangerousness predicate" and the "vileness predicate." At the sentencing phase of Roach's trial, the trial judge, finding the evidence of vileness insufficient as a matter of law, withdrew that predicate from the jury's consideration. The judge allowed the jury to consider the future dangerousness predicate alone. The jury, unanimously finding beyond a reasonable doubt that Roach represented a future danger to society, recommended the death penalty. The trial judge accepted the jury's recommendation and sentenced Roach to death.

On direct appeal, the Supreme Court of Virginia affirmed Roach's death sentence and the Supreme Court of the United States denied certiorari. Roach v. Commonwealth, supra. Roach v. Virginia, supra. After exhausting all state collateral remedies, Roach filed his petition for a writ of habeas corpus in the Western District of Virginia. In his thorough Memorandum Opinion, Chief Judge Samuel G. Wilson considered each of Roach's contentions and found no basis for federal habeas relief. Accordingly, the district court dismissed the petition.

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§ 16.1-269 was repealed in 1994 and replaced with a similar provision. See Va. Code Ann. § 16.1-269.1 (Michie 1997).

Roach now appeals that dismissal. The issues raised on appeal, as characterized by Roach, are as follows:

> 1. The proportionality review conducted by the Supreme Court of Virginia was constitutionally defective, in violation of Roach's due process rights;
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> 2. The evidence proffered by the Commonwealth during the penalty phase of the trial was constitutionally insufficient to support the jury's finding of future dangerousness;
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> 3. The trial court violated Roach's due process rights by refusing to instruct the jury regarding Roach's potential parole eligibility if sentenced to life imprisonment;
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> 4. The trial court violated Roach's due process rights by erroneously instructing the jury that its decision regarding punishment had to be unanimous;
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> 5. The procedure by which Virginia transferred Roach from juvenile court to circuit court for trial as an adult denied him a constitutionally mandated individualized assessment of maturity and moral responsibility.

Although Roach has placed special emphasis on the proportionality review issue, we have, in the circumstances of this case, made a comprehensive review of each of the issues presented by him on appeal. We address each of these five issues in turn.

II.

Roach filed his federal habeas corpus petition on February 12, 1998, after the April 24, 1996 enactment of the AEDPA. Accordingly, this Court must apply the deferential standard of review imposed by the AEDPA's amendments to 28 U.S.C.

§ 2254(d). See 28 U.S.C.A. § 2254 (West 1994 & Supp. 1998); Green v. French, 143 F.3d 865, 868 (4th Cir. 1998), cert. denied, 119 S.Ct. 844 (1999). Under the standards imposed by the AEDPA, a federal court may not grant a writ of habeas corpus on issues adjudicated in a state court unless the state proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C.A. § 2254(d) (West 1996). There is no allegation that Roach's sentence was based on an unreasonable determination of the facts; Roach does not claim that he is actually innocent of the murder of Mrs. Hughes. Therefore, our review is controlled by § 2254(d)(1). This court has previously interpreted the language of § 2254(d)(1) as authorizing habeas relief "only when the state courts have decided the question by interpreting or applying the precedent in a manner that reasonable jurists would all agree is unreasonable." Green v. French, 143 F.3d at 870.

A.

First, Roach argues that we must cause a writ of habeas corpus to issue because the Supreme Court of Virginia failed to conduct a meaningful proportionality review of his death sentence, in contravention of the Eighth and Fourteenth Amendments. According to Roach, the Supreme Court of Virginia failed to adequately review the imposition of the death

penalty against him, and such failure entitled him to federal habeas relief as a violation of the Due Process Clause.[3]

1.

Under Virginia law,[4] when a defendant has been convicted of a capital crime and sentenced to death, the Supreme Court of Virginia is required to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Roach v. Commonwealth, 468 S.E.2d at 113. When assessing whether the death sentence in question is excessive or disproportionate to the penalty imposed in other cases, the Supreme Court of Virginia considers "whether other

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[3] It appears from the record that Roach failed to raise this argument in his state habeas corpus petition. This issue, therefore, has not been exhausted and could be properly treated as procedurally defaulted. See Gray v. Netherland, 518 U.S. 152, 161-62 (1996). However, the issue of procedural default generally is an affirmative defense that the Commonwealth must raise and preserve. Yeatts v. Angelone, 166 F.3d 255, 261 (4th Cir. 1999). The Commonwealth has not asserted this defense here. Despite the Commonwealth's failure to preserve the issue, this court has the discretionary power to address a petitioner's procedural default sua sponte. Id at 262. However, as we have previously noted:

> The exercise of ... discretion should not be automatic, but must in every case be informed by those factors relevant to balancing the federal interest in comity and judicial economy against the petitioner's substantial interest injustice. Additionally, the court should consider whether justice requires that the habeas petitioner be afforded with notice and a reasonable opportunity to so address the issue of procedural default. Id. (citation omitted). Roach has not been provided with an opportunity to address the issue of procedural default. After consideration of these factors, we believe the proper course is to decline to address the issue of procedural default sua sponte, and to address the proportionality review issue on the merits.

[4] See Va. Code Ann. § 17-110.1(c)(1), (2) (Michie 1983).

sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." Id (citing Jenkins v. Commonwealth, 423 S.E.2d 360, 371 (Va. 1992)).

In its review of Roach's direct appeal, the Supreme Court of Virginia made a comprehensive comparison of the record from the trial court in this case with the records of other capital murder cases in Virginia, to determine whether the death penalty imposed on Roach was excessive or disproportionate to the penalty imposed for similar crimes. Id. Because Roach's jury imposed the death penalty on the basis of the future dangerousness predicate alone, the court gave particular consideration to other capital murder cases in which robbery was the underlying felony and the death penalty was based only on the future dangerousness predicate.[5] The court also reviewed capital murder cases in which robbery was the underlying offense and a sentence of life imprisonment was imposed. Id. Based upon its review of the records from these cases, the court concluded that, while there were exceptions, juries in Virginia "generally impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes." Id. at 114. Therefore, the Supreme Court of Virginia found the death penalty in this instance to be neither excessive nor disproportionate to the penalty imposed in comparable cases. Id.

2.

It is a well-settled proposition that the individual States are not constitutionally required to provide defendants who have been convicted of capital crimes with "proportionality reviews" of their death sentences. Pulley v. Harris, 465 U.S. 37, 50-51

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[5] Those cases were compiled in Yeatts v. Commonwealth, 410 S.E.2d 254, 267-68 (Va. 1991), and supplemented in Chichester v. Commonwealth, 448 S.E.2d 638, 652 (1994). Additionally, the Virginia Supreme Court stated that it considered Chandler v. Commonwealth, 455 S.E.2d 219 (Va. 1995), and Joseph v. Commonwealth, 452 S.E.2d 862 (Va. 1995). Roach v. Commonwealth at 113.

(1994). It is also generally accepted that federal habeas corpus relief is unavailable where a petitioner alleges the state court incorrectly or inadequately applied state law. See Buchanan v. Angelone, 103 F.3d 344, 351 (4th Cir. 1996), aff'd, 118 S.Ct. 757 (1998); Fisher v. Angelone, 163 F.3d 835, 854 (4th Cir. 1998). As we recently reiterated in Fisher, "basic principles of federalism permit us to review only those state court decisions that implicate federal constitutional rights." Id. In the present case, the proportionality review conducted by the Supreme Court of Virginia was mandated by a Virginia statute, not the federal constitution. Therefore, absent some specific evidence that the review procedures employed by that court constituted an independent violation of the federal constitution, we shall not entertain Roach's contention that the state court failed to follow state law. See id. at 854-55.

Recognizing the limited availability of federal habeas relief, Roach argues that the proportionality review scheme, as applied to his case, constitutes an independent violation of the Due Process Clause of the Fourteenth Amendment. Roach's basic argument may be outlined as follows: In order to avoid arbitrary and capricious sentencing and to ensure that capital punishment is applied consistently and fairly, the Eighth Amendment requires the States to institute procedures that narrow the class of persons eligible for the death penalty. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Zant v. Stephens, 462 U.S. 862 (1983). According to Roach, Virginia has decided to review the proportionality of all death sentences as the means of satisfying this constitutional requirement. Now that it has elected to provide proportionality reviews, Roach argues, Virginia must do so in accordance with the Due Process Clause. If the State's actions do not comport with due process, this Court has the authority to intercede.

Roach asserts that, since the reinstatement of the death penalty in Virginia, the Supreme Court of Virginia has never overturned a death sentence. When conducting its

proportionality review, Roach claims the court only reviews similar cases where the jury sentenced the defendant to death. Roach asserts that the court never reviews cases where similar defendants, convicted of similar crimes, were sentenced to life imprisonment. Such a system, Roach maintains, is merely a "rubber stamp" affirmance of the imposition of the death penalty and not the "comparative analysis" required by the Due Process Clause.

Roach's assertions directly conflict with the statements made by the Supreme Court of Virginia regarding the cases it reviewed. That court stated that it reviewed capital murder cases in which robbery was the underlying felony and the death penalty was based only on the future dangerousness predicate. Roach v. Commonwealth, 468 S.E.2d at 113. Additionally, the court reviewed the records of capital murder cases where robbery was the underlying offense and a sentence of life imprisonment was imposed. Id. In response, Roach simply maintains that the court could not have reviewed those cases and affirmed his death sentence.

Put simply, Roach would have this court attempt to" look behind" the review conducted by the Supreme Court of Virginia and endeavor to ascertain what that court "really did" (which, in his view, differs from what the court stated it did). As we explain below, this would be a virtually impossible task and the Constitution does not require us to engage in such a speculative undertaking.

3.

As noted above, this Court does not have the power to reexamine a state court's determination of state law. In Walton v. Arizona, 487 U.S. 639, 655 (1990), the Supreme Court was presented with a similar challenge to the proportionality review of the Arizona Supreme Court. The Court held that, where the statutorily defined aggravating factor had been construed in a manner that furnished sufficient guidance to the sentencer, proportionality review was not constitutionally required. Id. at

655-56. In such an instance, the Court could lawfully presume that the death sentence in question was not" want only and freakishly imposed" and, therefore, the sentence was not disproportionate within any recognized meaning of the Eighth Amendment. Id. The Court found that the Arizona Supreme Court undertook its proportionality review in good faith and, held that the Constitution did not require it to look behind the Arizona Supreme Court's conclusion that the sentence was proportional. Id. at 656.

The same rationale is applicable here. In a capital case in Virginia, the constitutionally mandated narrowing of the class of persons eligible for the death penalty occurs twice during the trial process. First, during the guilt phase of the trial, the jury must decide if the defendant falls within a statutorily defined class of capital offenders. See e.g., Va. Code Ann. § 18.2-31(4) (Michie 1998). Second, during the sentencing phase of the trial, the jury must unanimously find the presence of an additional aggravating factor. See Va. Code Ann. § 19.2 - 264.2 (Michie 1977). The Supreme Court has found statutorily defined aggravating factors to satisfy the narrowing requirement, see Zant v. Stephens, supra, and we have ruled that Virginia's future dangerousness predicate is constitutional. Giarratano v. Procurier, 891 F.2d 483 (4th Cir. 1989). Therefore, pursuant to Walton v. Arizona, there being no allegation or indication that the Supreme Court of Virginia undertook its proportionality review in something other than "good faith," we will not look behind its conclusion that the sentence received by Roach was proportional to sentences received by similar defendants for similar crimes.[6] As this

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[6] We agree with the reasoning of the district court which stated in its Memorandum Opinion that::

> Even assuming that the failure by the Supreme Court of Virginia to conduct its proportionality review in a meaningful manner could, under some circumstances, amount to a violation of the Fourteenth Amendment, Roach has not demonstrated that the Supreme Court of Virginia's review of

court noted in Buchanan v. Angelone, 103 F.3d 344 (4th Cir. 1996), aff'd 118 S.Ct. 757 (1998), "on collateral review, federal courts are not required to re-examine a state court's good faith findings." Id. at 351 (citing Walton v. Arizona, 497 U.S. at 656). Accordingly, Roach's assertion of a due process violation in the proportionality review afforded him by Virginia must fail, and this court must deny federal habeas relief on this claim.

B.

Roach next argues that the evidence proffered by the Commonwealth was insufficient, as a matter of constitutional right, to support the jury's finding of future dangerousness. By allowing the jury to consider this aggravating factor, Roach maintains, the trial court violated his Fourteenth Amendment due process rights.

As we explained in Turner v. Williams, 35 F.3d 872, 894 (4th Cir. 1994), the sufficiency of the evidence necessary to prove the existence of an aggravating factor is reviewed under the standard established by Jackson v. Virginia, 443 U.S. 307 (1979). Under the Jackson standard, a court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements ... beyond a reasonable doubt." Jackson at 319.

1.

> Roach's sentence was so deficient as to amount to a federal constitutional violation .... The record thus demonstrates that the Supreme Court of Virginia conducted a thorough review of Roach's sentence in compliance with Virginia law. Although this court may view the matter differently, it may not review the state court's good-faith finding that the death sentence was not disproportionate or excessive when compared to the sentence imposed in similar cases.

Roach v. Angelone, No. 97-0693-R, at 11-12 (W.D. Va. July 29, 1998).

Virginia's statutory scheme for capital sentencing requires a jury to find the existence of at least one of two aggravating conditions before it lawfully may impose the death penalty.

> [A] sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a serious continuing threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Va. Code Ann. § 19.2-264.2 (Michie 1977).[7]

In the present case, after evidence was presented in the sentencing phase of the trial, the trial judge determined that the State had failed to present sufficient evidence to allow the jury to consider the vileness predicate. Therefore, the trial judge withdrew the vileness predicate from the jury's consideration and permitted the jury to consider only whether the State had proved beyond a reasonable doubt that Roach represented a future danger to society.

2.

During the sentencing phase of the trial, the State presented evidence regarding Roach's past criminal convictions. That evidence demonstrated that within a seven-month period prior to the murder of Mrs. Hughes, Roach had "broken and entered a private residence, stolen a .357 Magnum pistol from that dwelling, committed two automobile larcenies, and violated a condition of his probation" by carrying a shotgun, which he

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[7] See also Va. Code Ann. § 19.264.4(C) (Michie 1980).

later used to murder Mrs. Hughes. Roach v. Commonwealth, 468 S.E.2d at 112. Of significance, the jury was also entitled to consider the evidence regarding the capital offense of which Roach had been convicted. Murphy v. Commonwealth, 431 S.E.2d 48, 53 (Va. 1993). That evidence was devastating– Roach murdered Mrs. Hughes with a shotgun as she stood in the doorway of her own home in order to steal her social security money and automobile. Roach v. Commonwealth at 112. As the Supreme Court of Virginia noted, under Virginia law, the facts and circumstances of the capital crime alone may be sufficient to support a finding of future dangerousness. Id.

This court may not substitute it, view of the evidence for that of the jury. Tuggle v. Thompson, 57 F. 3d 1356, 1369 (4th Cir.), vacated on other grounds, 516 U.S. 10 (1995). The Supreme Court of Virginia concluded that a reasonable jury could find that, given the evidence of Roach's escalating pattern of criminal behavior, culminating in the murder of Mrs. Hughes, there was a probability that Roach would commit criminal acts of violence that would constitute a continuing serious threat to society. Roach v. Commonwealth at 112. Viewing the evidence in the light most favorable to the prosecution, the conclusion of the Supreme Court of Virginia does not constitute an unreasonable application of, or conflict with, any clearly established federal law as determined by the Supreme Court of the United States.[8] See Green v. French, 143 F.3d at 870. We agree with the Supreme Court of Virginia and with the district court that the evidence was sufficient to

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[8] After reviewing this claim, Judge Wilson properly concluded:

> The court cannot find that the Supreme Court of Virginia's conclusion that this evidence, viewed in the light most favorable to the Commonwealth, was sufficient to prove future dangerousness conflicted with clearly established federal law as determined by the United States Supreme Court.

Roach v. Angelone, No. 97-0693-R, at 10-11 (W.D. Va. July 29, 1998).

support the finding of future dangerousness. The trial court did not deprive Roach of any constitutional protections in this regard.

C.

Roach next argues that the trial court erred by failing to instruct the jury that, if sentenced to life imprisonment, he would not become eligible for parole for a minimum of twenty-five years. Roach asserts that this court should extend the holding of Simmons v. South Carolina, 512 U.S. 154 (1994), to include cases where, if sentenced to life imprisonment, the defendant remains eligible for parole.

1.

In Simmons,[9] the defendant was tried and convicted of capital murder. Under South Carolina law, the defendant was ineligible for parole because he had previously pleaded guilty to other violent offenses. Id. at 156. Following the defendant's conviction, the State sought the death penalty based on his future dangerousness. Id. at 157.

During the penalty phase of the trial, Simmons presented evidence that the general public apparently misunderstood the meaning of the term "life imprisonment." Id. at 159. According to the evidence presented, the majority of people believed that if sentenced to life imprisonment in South Carolina, a convicted murderer would be paroled within twenty to thirty years. Id. During trial, the judge had refused to give any instructions to the jury regarding the defendant's ineligibility for parole. Id. at 160. Even when the jury inquired as to whether a sentence of life imprisonment carried with it the possibility of parole, the trial judge simply instructed the jury that they were not to concern themselves with parole or parole

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[9] We have recognized that Justice O'Connor's concurring opinion actually represents the holding in Simmons. See Keel v. French, 162 F.3d 263, 269 (4th Cir. 1998); Mu'min v. Pruett, 125 F.3d 192, 199 (4th Cir.), cert. denied, 118 S.Ct. 438 (1997).

eligibility. Id. Shortly after receiving this additional instruction, the jury returned with a sentence of death. Id.

In her concurring opinion, Justice O'Connor noted that capital sentencing proceedings must comport with the requirements of the Due Process Clause and, in our adversary system, a criminal defendant must be allowed the opportunity to meet the State's case against him. Id. at 175. Future dangerousness is a factor upon which the States may rely in seeking the death penalty, id.; California v. Ramos, 463 U.S. 992, 1002-03 (1983); however, where the State seeks to show that the defendant will be a future danger to society, the presentation of the fact that the defendant will never be paroled and released into the general public will often be the only way in which a violent criminal can successfully meet the State's case. Id. at 177. Therefore, the Court ruled, where the defendant is truly ineligible for parole, the Due Process Clause entitles the defendant to inform the jury of that fact. Id.

Roach now asserts that the logic of Justice O'Connor's holding in Simmons should be extended to circumstances where a sentence of life imprisonment includes the possibility of parole. Roach faces a serious problem with this assertion–this court has repeatedly considered this argument and consistently rejected it. [10] As the Supreme Court held, the decision whether or not to inform the jury of the possibility of the defendant's early release is generally left to the States. Simmons at 176. "In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact. " Id.

In Keel v. French, Keel was convicted of capital murder in North Carolina and sentenced to death. Keel, 162 F.3d at 266. Keel argued that the trial court's refusal to instruct the jury regarding his parole status pursuant to Simmons was a

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[10] See Keel v. French, 162 F.3d 263 (4th Cir. 1998); Wilson v. Green, 155 F.3d 396 (4th Cir.), cert. denied, 119 S.Ct. 536 (1998); Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997).

violation of his Eighth Amendment rights. Id. at 270. This Court, finding that Simmons limited the right to receive such an instruction to those instances where the alternative sentence is life without the possibility of parole, dismissed the petition. Id.

The Supreme Court of Virginia also considered this issue on Roach's direct appeal. Relying on its prior decision in Joseph v. Commonwealth, 452 S.E.2d 862 (Va. 1995), the court held that the Simmons rule applied only if the defendant was ineligible for parole. Because Roach would become eligible for parole in twenty-five years, the court concluded that he was not entitled to such an instruction. Roach v. Commonwealth, 468 S.E.2d at 105.[11]

2.

In order to obtain federal habeas relief, Roach must show that no reasonable jurist could interpret the rule of Simmons as limited in application to those defendants who are ineligible for parole under state law. Green, 143 F.3d at 870. Roach simply cannot make that showing. Had he not been sentenced to death, Roach would have been eligible for parole in twenty-five years. Therefore, under this Court's interpretation and application of Simmons, Roach is not entitled to habeas relief on this claim.

D.

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[11] After thoroughly reviewing this issue, the district court stated as follows:

> However compelling Roach's argument that the logic behind the decision in Simmons applies equally to his case, the court cannot find that the interpretation of Simmons adopted by the Supreme Court of Virginia is contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

Roach v. Angelone , No. 97-0693-R, at 7 (W.D. Va. July 29, 1998).

Roach next contests the trial court's jury instruction regarding the requirement of unanimity in the sentencing verdict.[12] Roach asserts that the last sentence of this instruction, "any decision you make regarding punishment must be unanimous" was improper. He argues that it impermissibly shifted the burden of proof and effectively instructed the jury that, in order to avoid the imposition of the death penalty, the defendant was required to persuade all of the jurors that one or more mitigating factors were applicable. This shifting of the burden of proof, Roach maintains, is constitutionally defective, and denied him the right to have all mitigating evidence considered and given appropriate weight by the jury.

1.

Unfortunately, Roach has a procedural problem with this issue--he failed to raise it on his direct appeal to the Supreme Court of Virginia. The first time Roach asserted this alleged error was in his state habeas corpus petition. The Supreme Court of Virginia, relying on its decision in Slayton v. Parrigan, 205 S. E.2d 680, 682 (Va. 1974), dismissed Roach's claim as procedurally barred. Roach v. Netherland, No. 96-2568 (Va.

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[12] The trial judge instructed the jury:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life .... Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt, the following aggravating circumstances, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society. If you find from the evidence that the Commonwealth has proved that circumstance beyond a reasonable doubt, then you may fix the punishment of the defendant at death, but if you believe from all of the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at ... imprisonment for life .... Any decision you make regarding punishment must be unanimous.

April 30, 1997). In Slayton, a prisoner filed a petition for habeas corpus, alleging ineffective assistance of counsel and an impermissibly suggestive pretrial identification. Id. at 681. The sole issue before the Supreme Court of Virginia was whether the petitioner had standing to attack the allegedly improper identification in a habeas proceeding where the petitioner did not assert the defense at trial and did not raise the issue on direct appeal. Id. Reasoning that "a prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes, " the court ruled that the petitioner had no such standing. Id. at 682.

Where a state court expressly denies a claim under a state procedural default rule, the defendant is generally precluded from raising that claim in a federal habeas corpus proceeding. Keel, 162 F.3d at 268 (citing Sawyer v. Whitley, 505 U.S. 333, 338 (1992)). The basis for the procedural default, however, must be an adequate and independent state ground. Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). "We have repeatedly recognized that the procedural default rule set forth in Slayton constitutes an adequate and independent state law ground for decision." Fisher v. Angelone , 163 F. 3d 835, 844 (4th Cir. 1998).[13] Therefore, absent a showing of actual innocence or cause and prejudice, this claim is procedurally barred from federal habeas review.

2.

As the district court noted, Roach does not maintain that he is actually innocent of the murder of Mrs. Hughes. This court, then, may only inquire as to whether cause and prejudice exists to excuse a state procedural default, not into whether the state court property applied its own law. Fisher at 844. Cause exists, and will serve to excuse the failure to raise a claim during a state proceeding, where the factual or legal basis for the claim

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[13] See also Mu'min v. Pruett, 125 F.3d 192, 196 (4th Cir.), cert. denied 118 S.Ct. 438 (1997); Bennett v. Angelone , 92 F.3d 1336, 1343 (4th Cir. 1996); Spencer v. Murray, 18 F.3d 229, 232 (4th Cir. 1994).

was not reasonably available to the claimant at the time of the state proceeding. McCleskey v. Zant, 499 U.S. 467, 494(1991).

The basis for Roach's claim here is that the trial court gave an erroneous instruction to the jury regarding the requirement of unanimity in the sentencing verdict. Both the factual and legal bases for this claim were available to Roach prior to his direct appeal. On its face, then, this claim has been procedurally defaulted. Roach, however, attempts to vault this sizable hurdle by asserting ineffective assistance of appellate counsel as the cause for his failure to raise this issue on direct appeal. Roach's argument is not compelling and must be rejected.[14]

3.

In order to prove that he has been denied his Sixth Amendment right to effective assistance of appellate counsel, Roach must satisfy the two-prong test set forth in Strickland v. Washington , 466 U.S. 668 (1984). First, Roach must show that

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[14] It is axiomatic that before a petitioner may obtain federal habeas relief, he must first exhaust his state remedies. 28 U.S.C.A. § 2254(b)(1) (West 1996). A claim is not exhausted until the petitioner has "fairly presented" his claim to the state's highest court. Picard v. Connor, 404 U.S. 270, 275-78 (1971). The petitioner must have presented the substance of the claim, including the facts underlying the claim, to the state court. Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997). In this instance, the district court found that Roach did not present the substance of his claim of ineffective assistance of appellate counsel to the Supreme Court of Virginia and, therefore, failed to exhaust his state remedies. Accordingly, the district court concluded, the claim is procedurally barred from federal habeas review. See Gray v. Netherland, 518 U.S. 152, 161-62 (1996).

Although the district court found Roach's claim of ineffective assistance of appellate counsel barred from federal review, it went on to address the merits of the claim. Upon review of the record, we agree with the district court that this claim is procedurally barred. A contrary conclusion would establish Strickland v. Washington , 466 U.S. 668 (1984), as the backdoor through which petitioners may avoid legitimate state procedural bars. However, like the district court, we recognize the finality of our decision in this death penalty appeal. Therefore, we have also independently reviewed the asserted merits of Roach's ineffective assistance claim and have found no basis for federal habeas relief.

his counsel's representation in the appellate proceedings fell below an objective standard of reasonableness. Id. at 688. Second, he must show that his attorney's substandard conduct prejudiced him to the extent that it deprived him of a fair trial. Id. at 689. In other words, Roach must demonstrate that, but for his attorney's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. See id. A reasonable probability is one that undermines confidence in the outcome of the proceedings. Id.

Roach alleges that his counsel rendered ineffective assistance when he failed to raise the allegedly improper jury instruction on direct appeal before the Supreme Court of Virginia. According to Roach, this improper instruction violated his Eighth and Fourteenth Amendment rights under the holdings of Mills v. Maryland, 486 U.S. 367 (1988), and McCoy v. North Carolina, 494 U.S. 433 (1990).

In Mills and McCoy, the trial courts instructed their respective juries that their findings as to mitigating circumstances had to be unanimous. The Supreme Court found such instructions to be unconstitutional. Mills at 384; McCoy at 444. Unlike the present case, however, both Mills and McCoy involved state sentencing schemes which required the jury to make findings as to specific mitigating circumstances. Mills at 370; McCoy at 436. A jury instruction violates the holdings of Mills and McCoy if there is a "reasonable probability" that the jury applied the instruction in such a way as to preclude its consideration of mitigating evidence. Boyde v. California, 494 U.S. 370, 380(1990).

Unlike the sentencing schemes at issue in Mills and McCoy. the Virginia sentencing scheme does not require juries to make findings as to specific mitigating factors. Instead, juries are instructed to consider all possible mitigating circumstances before rendering their sentencing decision. Here, the trial judge instructed the jury to "consider any evidence presented of circumstances which ... in fairness or mercy may extenuate or

reduce the degree of moral culpability and punishment." Additionally, the verdict form provided to the jury indicated that it must consider all mitigating evidence and it did not limit the jury's consideration of that mitigating evidence in any fashion. Based upon these facts, the district court found it unlikely that the general unanimity instruction given by the trial court prevented the jury from considering and giving appropriate weight to the mitigating evidence. Accordingly, the district court held that, to the extent the Supreme Court of Virginia considered the merits of this claim, its adjudication of the claim was reasonable under Strickland. [15]

We agree. In the present case, the trial judge instructed the jury to consider any and all evidence presented in mitigation of the crime. The verdict form reinforced that instruction. Based upon those facts, we cannot find a reasonable probability that the jury applied the general unanimity instruction in such a way as to preclude its consideration of the mitigating evidence presented by Roach.

In determining whether petitioner has demonstrated that his counsel's representation was inadequate, this court begins with the strong presumption that counsel's conduct fell within the wide range of objectively reasonable conduct. Evans v. Thompson, 881 F.2d 117, 124 (4th Cir. 1989). Because the jury instruction in question cannot be said to violate Mills and McCoy, Roach's appellate counsel's failure to raise the issue of

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[15] In this regard, the district court stated as follows:

> The court finds that the instruction, when considered in conjunction with the verdict form, did not create a "reasonable probability " that the jury applied the instruction in such a way as to preclude its consideration of mitigating evidence. Accordingly, to the extent that the Supreme Court of Virginia addressed this claim on the merits, its adjudication of the claim was reasonable under Strickland.

Roach v. Angelone, No 97-0693-R, at 17-18 (W.D. Va. July 29, 1998) (citation omitted).

the instruction on direct appeal does not fall outside that wide realm of objectively reasonable professional assistance. Strickland, 466 U.S. at 689. Therefore, Roach's claim of ineffective assistance of appellate counsel fails on its merits, and it is rejected.

E.

Finally, Roach argues that the procedure employed by the Commonwealth of Virginia to transfer him from the juvenile court system into the circuit court system for trial as an adult violated his Eighth and Fourteenth Amendment rights. According to Roach, because Virginia's juvenile transfer procedure does not mandate a judicial finding that the juvenile possesses the requisite maturity and moral responsibility to be tried as an adult, it is unconstitutional.

1.

At the time of Roach's arrest and indictment, transfers from the juvenile court system to the county court system were controlled by Va. Code § 16.1-269.[16] Under that statute, the juvenile court was required to determine merely if there were probable cause to believe the juvenile had committed an offense that would be a felony had it been committed by an adult.

In the present case, after the prosecution gave notice of its intent to try Roach as an adult, a transfer hearing was conducted in the Greene County Juvenile and Domestic Relations District Court. Roach v. Commonwealth at 98. The juvenile court found probable cause to believe that Roach had committed the crimes and advised the Commonwealth's attorney that he could seek indictments against Roach before a grand jury. Id. The trial court then reviewed the transfer order under Va. Code § 16.1-269 and found probable cause to

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[16] Va. Code § 16.1-269 was repealed in 1994 and replaced with a similar provision. See Va. Code Ann. § 16.1-269.1 (Michie 1997).

believe that Roach had committed the offenses in question. Id. Subsequently, Roach was indicted, tried, and convicted.

Roach advanced this claim on direct appeal before the Supreme Court of Virginia. Relying on its previous decisions in Wright v. Commonwealth, 427 S.E.2d 379, 383-84 (Va. 1993), vacated and remanded, 114 S.Ct. 2701 (1994), aff'd 450 S.E.2d 361 (Va. 1994), and Thomas v. Commonwealth, 419 S.E.2d 606, 609 (Va. 1992), the Supreme Court of Virginia rejected Roach's argument and held that the Commonwealth was not constitutionally required to provide individualized consideration of a juvenile's moral culpability and maturity under the Virginia transfer statute. Roach v. Commonwealth at 105.

In Thomas, a seventeen-year-old defendant appeared in juvenile court charged with first degree murder and capital murder. Thomas at 607. The defendant and his counsel waived a preliminary hearing and a transfer hearing in the juvenile court and the defendant was transferred to stand trial as an adult in circuit court. Id. at 608. Subsequently, the defendant's court-appointed lawyer was relieved and the court appointed new counsel, who moved to remand the proceeding to juvenile court for a full transfer hearing. Id. at 609. The trial court denied the motion to remand and the defendant was tried, convicted, and sentenced to death. Id. at 608.

On appeal, the Supreme Court of Virginia held that the Constitution required neither juvenile transfer hearings nor any other additional procedural safeguards for juveniles tried for capital crimes. Id. at 609. According to the court, "Virginia's death penalty statutes provide for individual consideration of all those tried on capital charges, with the age of the defendant at the time ... of the capital offenses' a statutorily prescribed mitigating factor the jury may consider in determining whether to fix punishment at death or life imprisonment." Id.; see also Va. Code Ann. § 19.2-264.4(B)(v) (Michie 1998).

In Wright, a seventeen-year-old defendant was transferred from the juvenile court system to the circuit court, where he was tried as an adult and convicted of numerous violent offenses, including capital murder. Wright, 427 S.E.2d at 381-82. After finding the existence of the future dangerousness predicate, the jury fixed the defendant's sentence at death. On appeal, the defendant argued that his Eighth Amendment rights had been violated because Virginia's juvenile transfer statute did not mandate consideration of his moral responsibility and psychological maturity. Id. at 384. Relying on Stanford v. Kentucky, Wright argued that he was deprived of the individual consideration required before a state lawfully may impose the death penalty on a minor. Id. The Supreme Court of Virginia disagreed. Relying on its previous holding in Thomas, the court reiterated that the Constitution did not require juvenile transfer hearings or any other additional procedural safeguards for juveniles tried for capital offenses, and that Virginia's death penalty statutes provided the requisite individualized consideration demanded by the Constitution. Id. at 384.

Now, in order to obtain federal habeas relief on this claim, Roach must demonstrate that these holdings are contrary to or an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States. In other words, Roach must show that the Supreme Court of Virginia interpreted or applied the precedent of the Supreme Court of the United States in a manner that reasonable jurists would all agree is unreasonable. Green v. French, 143 F.3d at 870.

2.

According to Roach, in order to pass constitutional muster, a state's laws must provide a fair basis for evaluating the culpability, moral responsibility, and maturity of a juvenile before referring him for trial and potential punishment as an adult. In order to make that determination, the State must provide the juvenile with "individualized consideration."

Like the defendant in Wright, Roach relies upon Stanford v. Kentucky, 492 U.S. 361, 375 (1989), for the proposition that the Supreme Court has mandated that this individualized culpability analysis take place prior to a decision to transfer a juvenile for trial as an adult for a capital offense. Because the juvenile court did not make such an individualized determination in the present case, Roach argues, his transfer to adult court for trial violated his Eighth and Fourteenth Amendment rights.

In our view, Roach's interpretation of Stanford is overreaching. In Stanford, the Supreme Court addressed whether the Eighth Amendment prohibited the execution of sixteen- and seventeen-year-old capital offenders. The Court concluded that the imposition of capital punishment under these circumstances did not violate the Eighth Amendment. In the portion of the opinion cited by Roach,[17] Justice Scalia discussed why state laws denying minors the right to drink alcoholic beverages, vote, or drive automobiles were inapplicable to the issue before the Court. Stanford at 374-75. According to Justice Scalia, capital punishment differs from the above generalized prohibitions, in that individualized consideration is a constitutional requirement. Id.

Notwithstanding Roach's assertions to the contrary, the Supreme Court simply did not hold that juvenile transfer statutes which do not provide for individualized consideration of the minor's maturity and moral responsibility violate the Constitution. Rather, Justice Scalia concluded that the transfer statutes in question [18] required the state courts to make determinations that ensured individualized consideration of the maturity and moral responsibility of sixteen- and seventeen-year-old offenders occurred before those minors were required to stand trial as adults. Id. at 375. The Supreme

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[17] Only four justices joined in this portion of the opinion.

[18] See Ky. Rev. Stat. Ann. § 208.170 (Michie 1982), repealed effective July 15, 1984; and Mo. Rev. State. § 211.071(6) (1986).

Court did not hold that all juvenile transfer statutes must provide an identical level of individualized consideration to minor defendants accused of capital crimes to be constitutional. Additionally, the Supreme Court did not proscribe a State from providing individual consideration in another manner.

In the present case, the Supreme Court of Virginia held that Virginia's capital sentencing scheme[19] satisfied the constitutional requirement of individual consideration. Roach v. Commonwealth, 468 S.E.2d at 105.[20] Because the Supreme Court did not rule that individual consideration of the defendant's maturity and moral responsibility was required at the juvenile transfer stage, a reasonable jurist could conclude that Virginia's procedure satisfies the Constitution. Accordingly, Roach cannot meet his burden of proof here. He has not demonstrated that the Supreme Court of Virginia's adjudication of this claim is contrary to or an unreasonable application of clearly established federal law as decided by the

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[19] See Va. Code Ann. § 19.2-264.4(B) (Michie 1998), which provides that the defendant's age at the time of the offense may be considered as a mitigating factor by the sentencing jury.

[20] Judge Wilson, in his Memorandum Opinion in the district court, agreed, stating:

> Justice Scalia did not state that juvenile transfer statutes which do not provide for individualized consideration violate the Constitution. A reasonable jurist could conclude, therefore, that the Constitution does not require a judicial determination of a juvenile offender's moral culpability and maturity before the state may try the juvenile as an adult for a capital crime.... The court concludes that Roach has not demonstrated that the Supreme Court of Virginia's adjudication of this claim conflicted with clearly established federal law as decided by the United States Supreme Court.

Roach v. Angelone, No. 97-0693-R, at 8-9 (W.D. Va. July 29, 1998) (footnotes omitted).

Supreme Court of the United States and, therefore, he does not qualify for federal habeas relief on this claim.

III.

Roach – who is clearly guilty of committing an egregious offense against Mrs. Hughes and the peace and dignity of the Commonwealth of Virginia – has been accorded a full array of post-conviction remedies. He has, in candor, been provided with all the process due under our system of justice, by way of both direct appeal and collateral proceedings challenging his conviction and sentence. Pursuant to the foregoing, we must conclude that Roach has failed to make a substantial showing of the denial of a constitutional right and that there is no valid basis for habeas corpus relief. Roach's petition for a certificate of appealability is therefore denied and his appeal of the decision of the district court is dismissed.

CERTIFICATE OF APPEALABILITY
DENIED AND APPEAL DISMISSED

PRIOR HISTORY. FROM THE CIRCUIT COURT OF GREENE COUNTY. Lloyd C. Sullenberger, Judge.

DISPOSITION: Affirmed.

COUNSEL: David L. Heilberg (Peter L. McCloud; Boyle, Bain & Downer, on briefs), for appellant.

Robert B. Beasley, Jr., Assistant Attorney General (James S. Gilmore, III, Attorney General, on brief), for appellee.

JUDGES: Present: All the Justices. OPINION BY JUSTICE BARBARA MILANO KEENAN.

OPINIONBY: BARBARA MILANO KEENAN

In this appeal, we review a capital murder conviction and a death sentence imposed upon Steve Edward Roach for the murder of Mary Ann Hughes, his 70-year-old neighbor.[1]

1. PROCEEDINGS

Juvenile petitions were issued against Roach, who was 17 years old at the time of these offenses, charging him with capital murder, use of a firearm in the commission of murder, and robbery. The Commonwealth gave notice of intent to try Roach as an adult and a transfer hearing was conducted in the Greene County Juvenile and Domestic Relations District Court (the juvenile court). Finding probable cause to believe that Roach committed the crimes, the juvenile court advised the Commonwealth's Attorney that he could seek indictments against Roach before a grand jury. The circuit court then

[1] Roach has not appealed his convictions of robbery and use of a firearm in the commission of murder.

reviewed the transfer order under Code § 16.1-269 and found probable cause to believe that Roach committed all three offenses.

Roach was tried as an adult on indictments charging (1) capital murder of Mary Ann Hughes in the commission of robbery while armed with a deadly weapon, in violation of Code § 18.2-31(4); (2) use of a firearm in the commission of murder, in violation of Code § 18.253. 1; and (3) robbery by violence to the person of Mary Ann Hughes, in violation of Code § 18.2-58. At the first stage of a bifurcated jury trial conducted pursuant to Code §§ 19.2-264.3 and -264.4(A), Roach was found guilty as charged in all three indictments.[2]

At the penalty phase of the capital murder trial, the court struck the evidence as to the "vileness" predicate of a capital sentence, but submitted the case to the jury upon the "future dangerousness" predicate. The jury found that the "future dangerousness" predicate was satisfied and unanimously fixed Roach's punishment at death.

Upon review of victim impact statements and a probation officer's report, and after conducting a sentencing hearing, the trial court sentenced Roach in accord with the jury verdict on the capital murder conviction. Further, the court sentenced Roach to three years imprisonment for the use of a firearm in the commission of a murder and to life imprisonment for robbery.

II. THE EVIDENCE

Guilt Phase

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[2] Since Roach was a juvenile at the time these offenses were committed, the jury did not, fix punishment on the non-capital charges. See Code § 16. 1-272.

We will review the evidence in the light most favorable to the Commonwealth, the prevailing party below. *Cheng v. Commonwealth*, 240 Va. 26, 42, 393 S.E.2d 599, 608 (1990). On the evening of December 3, 1993, Mary Ann Hughes was shot and killed in her home about five miles west of Stanardsville. Hughes was standing at her open front door when she was shot. Her body was discovered the next day.

The cause of death was a single shotgun wound to the chest, which caused injury to an artery, the chest wall, and the right lung. Dr. Deborah Kay, the medical examiner who performed the autopsy on Hughes, recovered shotgun pellets and wadding from Hughes's chest. The pellets and wadding were identified as number eight shot from a 12 gauge Remington shot shell case.

The day before the killing, Roach brought a 12 gauge shotgun to a neighbor's house, and he and two friends engaged in shooting the gun in the back yard using number eight shot. The police later recovered from the neighbor's back yard number eight shot that was consistent with a 12 gauge Remington shell case.

Roach and Hughes were also neighbors. Roach helped Hughes with household chores and also spent a great deal of time visiting her. The evidence showed that Roach was familiar with Hughes's habits, and that Hughes customarily deposited her social security check in the bank within the first few days of each month.

On the night she was killed, Hughes's purse, containing a Discover credit card and approximately sixty dollars in cash, was taken from her home. Hughes owned a 1981 Buick Regal, which also was taken.

In the early morning hours of December 4, 1993, Gregory Lee Giuriceo, Jr., a deputy sheriff for Nottoway County, noticed a Buick Regal parked in a parking lot of a shopping

center in Blackstone. Roach was identified by Giuriceo as the operator of the car. After leaving the parking lot, Giuriceo determined that the automobile was registered to Hughes.

Later in the morning of December 4, 1993, Roach attempted to use Hughes's Discover bank card at an automated teller machine in Louisburg, North Carolina. A video tape from the machine showed Roach attempting to withdraw cash from Hughes's account.

On December 5, 1993, Trooper David F. Chavis of the South Carolina Highway Patrol observed a 1981 Buick Regal automobile with Virginia plates which was being driven at 69 miles per hour in a 55 mile per hour zone. He activated the lights on his patrol car and proceeded behind the Buick. The driver of the Buick drove the automobile over to the left shoulder of the road, got out of the car, ran into the woods at the side of the road, and escaped. The driver was wearing clothes which matched the description of the clothes Roach had been seen wearing for the previous two days.

Trooper Chavis impounded the vehicle and traced its ownership to Hughes. Items retrieved from the automobile included Hughes's purse, a blue jacket, a number eight load shotgun shell, and a plastic bag from a Winn-Dixie grocery store. Mahlon Jones, a fingerprint expert employed by the Commonwealth's Division of Forensic Science, identified a latent palm print from the plastic bag as matching Roach's left palm print. In addition, latent fingerprints were recovered from the automobile which matched Roach's fingerprints.

Roach made several telephone calls to his aunt, Annie Betty Dean, while he was in North Carolina and South Carolina. During those telephone conversations, she asked him to "come home and give [himself] up." On December 6, 1993, Roach contacted Sheriff William L. Morris and arranged to come that day with his father to the Sheriff's Department for questioning.

At the Sheriff's Department, Morris advised Roach of his Miranda rights in the presence of Roach's father. Roach waived his rights, and both he and his father signed the waiver form. Sheriff Morris then questioned Roach out of his father's presence. Clarence Roberts, an acquaintance of the Roach family and an employee of the Department of Alcoholic Beverage Control, was present with Morris during the interview.

At first, Roach told Morris that he and a friend, Scott Shifflett, went to Hughes's house on the evening of December 3, 1993. Roach said that Shifflett left the 12 gauge shotgun at the door, and that they entered the house and played Yahtzee with Hughes. Roach recounted that Shifflett then took the keys to the Buick Regal and the two began to leave the house. Roach said that, after he left, Shifflett ran back to the front door, fired one shot, and ran back to the Buick with Hughes's purse. According to Roach, Shifflett said that he had "fired through the roof to scare her."

Roach stated that Shifflett then jumped into the driver's seat of the Buick and they drove to North Carolina. He said that Shifflett must have tried to use Hughes's Discover credit card while Roach was in a Winn-Dixie store making some purchases. Roach also stated that he and Shifflett abandoned Hughes's vehicle in North Carolina.

During the questioning, Morris related to Roach certain evidence that had already been discovered, stating, "With all these discrepancies in the story, I'm finding it really a little difficult to believe some of the things you're telling me." Roberts then told Roach that he knew Roach was lying and that "this is a heavy burden to carry on your shoulders for the rest of your life, if you committed this act you need to tell Sheriff Morris and you need to unburden yourself."

Roach then told Morris,

> I went over there and saw her counting the money and as I was leaving, I had the shotgun laying at the door and I shot her, took the money, the car and left, went to North Carolina. And I cashed – I tried to use – use the credit card but – about four times[,] but it wouldn't work.

When asked where he shot Hughes, he answered, "In the chest."

At trial, Roach offered evidence that there was no gunshot residue on his hands or clothes when he was arrested. He also presented evidence that no footprints at the scene of the crime matched the shoes he was wearing on December 3, 1993. In addition, Barbara Llewellyn, an expert employed by the Division of Forensic Science in the analysis of blood and body fluid, testified that, when Roach was arrested, he had no blood on his clothing, except a "very light stain" on his shirt, despite the fact that the fatal wound perforated one of Hughes's arteries and the pattern of blood splatters indicated that the person who had fired the gun was standing within five feet of Hughes.

Penalty Phase

During the penalty phase of the trial, the Commonwealth put on evidence of Roach's prior Juvenile convictions. Roach had been convicted twice of grand larceny of an automobile. He committed the first larceny in May 1993 and the second in August 1993. In connection with the first automobile larceny, Roach was convicted of reckless driving and failure to stop for a police officer.

In June 1993, Roach was convicted of breaking and entering a residential dwelling and of grand larceny arising out of the burglary. Roach gained entry to the home by breaking a window. He then ransacked the house and stole a .357 magnum pistol.

In August 1993, Roach was sentenced to supervised probation and house arrest under the supervision of his parents at all times. He violated the conditions of this probation when he left the family home and carried a weapon.

When Roach was placed on probation in August 1993, a psychological evaluation was ordered. The psychologist recommended that Roach and his family attend family counseling and that Roach increase his level of academic attainment. Roach had stopped attending school in 1991 when he was 14 years old."

According to John T. Frey, Roach's probation officer, Roach and his family attended counseling sessions at the regional counseling center prior to December 1993. Roach also enrolled in G.E.D. classes in the adult education program offered by Greene County.

Shirley Ann Roach, Roach's mother, testified that she and Roach's father had separated and reconciled their marriage four times during Roach's childhood. She testified that she and her husband requested that Roach be released because he was needed around the house to do chores and to care for his brothers. She also stated that she did not realize that possessing a weapon violated the terms of Roach's probation because the probation papers did not explicitly state this fact.

John Roach, Roach's father, testified that he was frequently absent from home. He also suffered from significant health problems. When Steve Roach was six years old, John Roach sustained a shotgun injury which required him to remain in the hospital for six months. While being treated for the gunshot wound, he contracted Hepatitis C from a blood transfusion. The medication he received for this condition caused mood changes.

John Roach testified that, when his wife left him, life "got worse" for his children. He began drinking heavily and brought young girls into the house in order to make his wife jealous. He stated that the children were present when this occurred and that they did not receive parental supervision. He also stated that Steve Roach had free access to all the guns in the house.

Several family friends and relatives testified on Steve Roach's behalf. Clarence Roberts testified that Roach had performed numerous "odd jobs" for him, and that Roach was "an excellent employee." Tammy Estes, Roach's half sister, stated that Roach often helped his neighbors, including Hughes, cut firewood, cook, and clean their laundry.

Wendell Lamb, the pastor of Roach's church, testified that Roach volunteered his time to help paint and remodel the church and to work at a camp for children in the George Washington National Forest. Lamb conceded that, while Roach was doing volunteer work for the church, he was accused of stealing a watch. Roach and the owner of the watch resolved the dispute privately.

Roach testified on his own behalf. He stated that, shortly after 9:00 p.m. on December 3, 1993, he walked to Hughes's house with his shotgun. When she opened the door, he fired once, walked past her body, and took her purse and the keys to her car. He stated that he then drove to North Carolina and attempted to use her Discover credit card to get cash. Roach testified that he did not know Hughes had died until he spoke by telephone with his aunt.

Roach also testified that, when he went to Hughes's house, he knew she had just received her social security check, knew the location of her purse, and intended to steal both items. However, he stated that he did not intend to hurt her, and that he could not explain "what went . . . through [his] mind." He also testified that he was sorry he had killed Hughes, stating, "I wish I could bring her back."

Dr. Gary Lee Hawk, a forensic psychologist appointed by the court, testified concerning his evaluation of Roach. Hawk met with Roach on six different occasions and spoke with Roach's parents and other family members. Hawk determined that Roach was of average intelligence and had mild depressive symptoms. Hawk found no indication that Roach had suffered any brain injury. He also found no evidence that Roach suffered from any serious mental illness.

Hawk testified that Roach lied to him about a number of things and gave him four different versions of what happened on December 3, 1993. He also stated that Roach was "particularly immature" for his age. Hawk concluded that Roach had poor "impulse control" and "did not show very good ability in many situations to control his emotions or behavior like seventeen-year-old or eighteen-year-old individuals should do."

Hawk related Roach's immaturity to the fact that he did not get the guidance and the structure that children need to mature. Hawk further stated that Roach's probation violation for carrying a weapon was a result of this lack of structure and supervision. He also testified that there was no pattern of violent behavior in Roach's life.

Hawk stated that, in psychological terms, Roach's act of killing a friend arose from the fact that "adolescents in conflict, adolescents in turmoil frequently express extremely strong and angry emotions with very little provocation . . . If it's an immature adolescent, that sort of reaction is more extreme." Hawk stated that "displacement of emotion" occurs when one person or situation makes a person angry, but the feelings and anger are expressed toward someone else.

Hawk stated, "Knowing that this was a woman that [Roach] was close to, and knowing that there was not an existing pattern of this sort of violent offending, and considering what

he told me, it's dynamics like that [which] would explain [the murder] in psychological terms." In addition, Hawk testified that, "in terms of normal development," Impulsiveness diminishes and "doesn't cause problems for the person."

III. ARGUMENTS WAIVED

Because Roach did not address in his briefs assignments of error 15(c), 16(f), and 16(h), he is deemed to have waived them.[3] Rule 5:27. Also, since Roach did not ask the trial court to strike certain prospective jurors for cause, after they heard another prospective juror state a belief that Roach was guilty, he has waived this objection to the empanelment of those jurors. Rule 5:25.[4]

IV. ISSUES PREVIOUSLY DECIDED

Roach has advanced a number of arguments that we have rejected in previous decisions. Finding no reason to modify our previously expressed views, we will reaffirm our earlier decisions and reject the following contentions:

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[3] These assignments of error are:

15(c): Virginia's juvenile transfer statute is unconstitutional as applied.

16(f): The trial court erred in overruling the motion to prohibit the imposition of the death penalty and to strike the capital murder charge on the grounds that the post-sentence report infringes upon the defendant's rights to due process, to confront his accusers, to be free from cruel and unusual punishment, and to effective assistance of counsel.

16(h): Virginia's death penalty statutes as administered deny capital defendants effective assistance

[4] Roach has also argued that he received ineffective assistance of counsel during voir dire based on this occurrence. However, such a claim is not reviewable on direct appeal. *Walker v. Mitchell, 224 Va. 568, 570, 299 S.E.2d 698, 699 (1983); Browning v. Commonwealth, 19 Va.. App. 295, 297, n.2, 452 S.E. 2d3 60, 362, n.2 (1994); see* Acts 1990, ch.74.

A. The denial of a jury instruction that Roach would be required to serve a minimum of twenty-five years before becoming eligible for parole. In *Joseph v. Commonwealth, 249 Va. 78, 84, 452 S. E. 2d 862, 866,* cert. denied, ___ U.S.___, 116 *S.Ct. 204 (1995),* we held that such an instrument is not available to defendants who will be eligible for parole at a future date.

B. The trial court's refusal to limit evidence of juvenile and unadjudicated crimes as background evidence at sentencing. Rejected in *Beaver v. Commonwealth, 232 Va.. 521, 528-29, 352 S.E.2d 342, 346-47,* cert. denied, *483 U.S. 1033 (1987).*

C. The Virginia transfer statute does not provide individualized consideration of a juvenile's moral culpability and maturity. Rejected in *Wright v. Commonwealth, 245 Va. 177, 182-83, 427 S.E.2d 379, 383-84 (1993),* vacated and remanded, ___ U.S. __, *114 S.Ct. 2701 (1994),* aff'd, *248 Va.. 485, 450 S.E.2d 361 (1994),* cert. denied, _ U.S. _, *115 S.Ct. 1800 (1995); Thomas v. Commonwealth, 244 Va.. 1, 7, 419 S.E.2d 606, 609,* cert. denied, *506 US. 958, 121 L. Ed. 2d 343, 113 S.Ct. 421 (1992).*

D. The sentencing verdict form prescribed by Code § 19.2-264(D) renders the jury's option of imposing a life sentence unconstitutionally vague and obscures mitigation evidence. We rejected these contentions in *Stockton v. Commonwealth, 241 Va. 192, 215, 402 S.E.2d 196, 209,* cert. denied, *502 U.S. 902, 116 L. Ed. 2d 231, 112 S.Ct. 280 (1991),* and in *LeVasseur v. Commonwealth, 225 1b. 564, 594-95, 304 S.E. 2d 644, 661 (1983),* cert. denied, *464 U.S. 1063, 79 L. Ed. 2d 202, 104 S.Ct. 744 (1984).* Thus, we find no error in the trial court's refusal to substitute Roach's proposed verdict form for the statutory sentencing verdict form.

E. The death penalty statutes do not give meaningful guidance to jurors that they may impose a death sentence only if they determine beyond a reasonable doubt that aggravating

circumstances outweigh mitigating ones. Rejected in *Breard v. Commonwealth, 248 Va.. 68, 74, 445 S. E. 2d 670, 674-75,* cert. denied, ___ U.S. ___, *115 S.Ct. 442 (1994); Watkins v. Commonwealth, 229 Va.. 469, 490-91, 331 S. E. 2d 422, 438 (1985),* cert. denied, *475 U.S. 1099, 89 L. Ed. 2d 903, 106 S.Ct. 1503 (1986).*

F. Code § 19.2-264.4(C) violates the defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution because the jury may find future dangerousness based upon unadjudicated crimes. Rejected in *Evans v. Commonwealth, 222 Va. 766, 770, 284 S.E.2d 816, 817-18 (1981),* cert. denied, *455 U.S. 1038 (1982);* see also *Watkins v. Commonwealth, 238 Va. 341, 352, 385 S.E.2d 50, 56 (1989),* cert. denied, *494 U S. 1074, 108 L. Ed. 2d 798, 110 S.Ct. 179 7 (1990).*

G. The capital murder and death penalty statutes as administered are unconstitutional for every reason cited by the majority in *Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S.Ct. 2726 (1972):* In *Fitzgerald v. Commonwealth, 223 Va. 615, 635-36, 292 S.E. 2d 798, 810 (1982),* cert. denied, *459 US. 1228 (1983),* we held that the Virginia capital murder statutes eliminated the constitutional violations identified in Furman. Further, in *Clark v. Commonwealth; 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979),* cert. denied, *444 U.S. 1049 (1980),* we rejected the argument that the Virginia death penalty sentencing statutes violated the restrictions of the Furman holding.

H. The death penalty statutes deny defendants meaningful appellate review and deny defendants equal protection of the law and due process of law because of the single tier of appellate review of death sentences. Rejected in *Payne v. Commonwealth, 233 Va. 460, 473-74, 357 S.E.2d 500, 508,* cert. denied, *484 U.S. 933 (1987).*

V. PRETRIAL MATTERS

A. Juvenile Court Issues

Roach contends that the statutes defining the authority of juvenile court intake officers violate the separation of powers clauses of the Virginia Constitution, Art. I, § 5 and Art. III, § 1. He asserts that, since intake officers are employees of the Department of Youth and Family Services, an executive agency, they are constitutionally prohibited from exercising the judicial powers of determining probable cause, issuing petitions or criminal warrants, or issuing detention orders.

Initially, we note that statutes are presumed to comply with the Virginia and United States Constitutions and will be declared unconstitutional only when their provisions plainly violate either document. *Etheridge v. Medical Ctr. Hosp., 237 Va. 87, 94, 376 S. E. 2d 525, 528 (1989).* In *Winchester & Strasburg R.R. v. Commonwealth, 106 Va. 264, 55 S.E. 692 (1906),* we stated that the separation of the executive, judicial, and legislative branches of government is "indispensable to public liberty." However, we emphasized that the separation required by the Virginia Constitution is not an absolute separation. We held that the branches of government need not "be kept wholly and entirely separate and distinct, and have no common link or dependence. . . The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments." Id. at 270, 55 S.E. at 694 (citations omitted).

The juvenile and domestic relations district court judges share appointment, assignment, and discharge powers over the intake officers with the Department of Youth and Family Services. See Code §§ 16.1-233 and -235. In filing a petition to initiate a criminal case, the intake officer makes a determination that there is probable cause to believe that a juvenile has committed a criminal offense. See Code § 16.1-260. However, the juvenile and domestic relations district court, not the Department of Youth and Family Services, has original

jurisdiction over matters involving the delinquent juvenile. Code § 16.1-24 1. Further, the failure of an intake officer to file a petition does not divest the juvenile and domestic relations district court of jurisdiction over the juvenile. Code § 16.1-260(G).

Thus, juvenile intake officers do not exercise the whole power of the judiciary. Because such officers exercise only a limited judicial function, and the juvenile and domestic relations district court retains actual control over the juveniles, we conclude that the intake officer's authority to issue criminal petitions does not violate the separation of powers guaranteed by the Virginia Constitution.

Next, Roach argues that the circuit court acquired jurisdiction to try him only for the lesser included offense of first degree murder. He asserts that, since the juvenile court did not render a probable cause determination concerning the presence of aggravating circumstances supporting imposition of the death penalty, the circuit court did not acquire jurisdiction to impose the death penalty. We disagree.

Before Roach could be transferred to the circuit court for trial as an adult, the juvenile court was required by former Code § 16.1-269 (now § 16.1-269.1) to determine whether there was probable cause to believe that he committed an offense which would be a felony had it been committed by an adult. The aggravating circumstances required for imposition of the death penalty are not elements of the crime of capital murder. They relate only to the punishment authorized after conviction of the offense. Therefore, the juvenile court was not required to make a probable cause determination of the sufficiency of the evidence in support of the statutory predicates for imposition of the death penalty.

B. Bill of Particulars

Roach filed a motion for a bill of particulars.[5] The trial court granted the motion with respect to paragraph (f) involving unadjudicated allegations of misconduct and "any circumstances of the offense [the Commonwealth] contends are relevant to proof of the [future dangerousness] factor." The court denied the balance of the motion. Roach argues that the trial court's denial of the remaining parts of the motion constitutes error based on the gravity of the penalty sought. We disagree.

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[5] The motion for. a bill of particulars requested that the trial court enter an order directing the Commonwealth:

a) To identify the grounds, and all of them, on which it contends that defendant is guilty of Capital Murder under Va. Code Ann. [§] 18.2-3 1.

b) To identify the evidence, and all of it, upon which it intends to rely in seeking a conviction of Defendant upon the charge of Capital Murder.

c) To identify the aggravating factors, if any, upon which it intends to rely in seeking the death penalty, should defendant be convicted of Capital Murder.

d) If the response to (c) includes statement that Commonwealth intends to prove the "vileness" factor as set out in Va. Code Ann. § 19.2-264.4C, to identify as many of the components of the factor, torture, depravity of mind, aggravated battery on which it intends to offer evidence.

e) If the response to (c) include statements that Commonwealth intends to prove the "vileness" factor as set out in Va. Code Ann. § 19.2-264.4C, to identify every narrowing construction of that factor on which it intends to offer evidence.

f) If the response to (c) include statements that the Commonwealth intends to use to prove the "future dangerousness" factor as set out in Va. Code Ann. § 19.2-264.4C, to identify any unadjudicated allegations of misconduct by defendant upon which it intends to offer evidence and any circumstances of the offense it contends are relevant to proof of the factor.

g) To identify the evidence, and all of it, on which it intends to rely in support of the aggravating factors identified, and all other evidence which it intends to introduce in support of its contention that death is the appropriate punishment for this Defendant.

A defendant is not entitled to a bill of particulars as a matter of right. Code § 19.2-230 provides that a court "may direct the filing of a bill of particulars." Thus, the trial court has discretion whether to require the Commonwealth to file a bill of particulars. *Quesinberry v. Commonwealth, 241 Va. 364, 372, 402 S.E.2d 218, 223,* cert. denied, *502 U.S. 834, 116 L. Ed. 2d 82, 112 S.Ct. 113 (1991).*

If the indictment gives a defendant sufficient "notice of the nature and character of the offense charged so he can make his defense," no bill of particulars is required.[6] *Wilder v. Commonwealth, 217 Va.. 145, 147, 225 S.E.2d 411, 413 (1976).* The indictment in this case met that standard. Therefore, the trial court did not abuse its discretion in denying the balance of Roach's motion. See *Strickler v. Commonwealth, 241 Va.. 482, 490, 404 S. E. 2d 22 7, 233,* cert. denied, *502 U S. 944 (1991).*

C. Voluntariness of Roach's Confession

Roach argues that the trial court erred in refusing to suppress his confession as being involuntary "for purposes of exposing him to the death penalty." Roach asserts that his waiver of Miranda rights was "questionable," and that he made his statements based on the mistaken belief that he would receive the benefit of a lesser penalty in exchange for admitting that he had shot Hughes. He contends that the statements were induced by Sheriff Morris's allegedly misleading remarks such as "the truth is so very, very important to you, to us and to yourself."

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[6] The capital murder indictment alleged that "on or about December 3, 1993, STEVE EDWARD ROACH . . . did, in the County of Greene, unlawfully and feloniously commit capital murder by the willful, deliberate, and premeditated killing of Mary Ann Hughes in the commission of robbery while armed with a deadly weapon, which offense is punishable as a felony in violation of Section 18.231(4) of the Code of Virginia."

In assessing the voluntariness of Roach's statement, we apply a well-established standard of review. In *Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157,* cert. denied, *484 U.S. 873, 98 L. Ed. 2d 158, 108 S.Ct. 207 (1987),* we said:

> A defendant's waiver of his Miranda rights is valid only if the waiver is made knowingly, voluntarily and intelligently, *Miranda, 384 U.S. at 475.* Whether a statement is voluntary is ultimately a legal rather than factual question. See *Miller v. Fenton, 474 U.S. 104, 110, 106 S.Ct. 445, 450, 88 L. Ed. 2d 405 (1985).* Subsidiary factual questions, however, are entitled to a presumption of correctness.. Id. *at 112, 106 S.Ct. at 451.* The test to be applied in determining voluntariness is whether the statement is the "product of an essentially free and unconstrained choice by its maker," or whether the maker's will "has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte, 412 US. 218, 225, 36 L. Ed. 2d 854, 93 S.Ct. 2041 (1973).* In determining whether a defendant's will has been overborne, courts look to "the totality of all the surrounding circumstances," *id. at 226,* including the defendant's background and experience and the conduct of the police, *Correll v. Commonwealth, 232 Va. 454, 464, 352 S.E.2d 352, 357 (1987); Stockton, 227 Va. at 140, 314 S. E. 2d at 381. Id.* at 324, 356 S.E.2d at 163.

The record shows that Roach was of average intelligence, and that he telephoned Sheriff Morris to initiate the questioning. Prior to the interrogation, Morris advised Roach and Roach's father of Roach's Miranda rights. Although John Roach was not present during the interrogation, both he and Steve Roach indicated that they understood the Miranda rights and they signed the waiver forms. During the interrogation, there was no mention of the death penalty at any time. Roach stated to

Morris that he was making the statements of his own free will, without pressure of threats or promises.

We also consider the factual findings made by the trial court. The trial court found that Roach "was not intoxicated [and] understood his surroundings and the questions asked of him." The court found that the interrogation atmosphere was not coercive and that Roach had not been threatened in any way. The court found that the entreaties to Roach to tell the truth did not overbear Roach's will. Because these factual findings are supported by the record, we accord them substantial weight in our determination whether Roach's statements were voluntary. *Miller v. Fenton, 474 US. 104, 112, 88 L. Ed. 2d 405, 106 S.Ct. 445 (1985).*

Based on the above evidence and findings, we hold that Roach's statements were voluntary, No threats or promises were made to induce the confession and there is no evidence indicating that the confession was coerced. Instead, the evidence demonstrates that the statements were the product of Roach's free and unconstrained choice.

D. Venue

Roach filed a motion for a change of venue on the basis that the crime, a "high profile" murder in a rural setting, rendered the trial court unable to empanel an impartial jury. The trial court took the motion under advisement and, after the jury was empanelled, overruled the motion.

Roach argues that the trial court erred in denying his motion for a change of venue because the pretrial publicity was widespread and prejudicial. He notes that over 50 percent of the jury pool was familiar with Roach, the victim, members of her family, the Commonwealth's Attorney, or witnesses. The trial court observed, however, that although 31 jurors were stricken for cause, "a large number of those were stricken because of their view concerning the death penalty and not

because of any evidence of bias for or against the accused or the prosecution."

A presumption exists that a defendant can receive a fair trial in the jurisdiction in which the offense occurred. *Stockton, 227 Va. at 137, 314 S.E.2d at 380.* In order to overcome this presumption, a defendant must demonstrate that the citizens of the jurisdiction feel such prejudice against the defendant as is reasonably certain to prevent a fair trial. Id. Further, the decision whether to grant a change of venue lies within the sound discretion of the trial court. *George v. Commonwealth, 242 Va.. 264, 2 74, 411 S. E. 2d 12, 18,* cert. denied, *503 U.S. 973, 118 L. Ed. 2d 308, 112 S.Ct. 191 (1992).*

The fact that there have been media reports about the accused and the crime does not necessarily require a change of venue. *Buchanan v. Commonwealth, 238 Va. 389, 407, 384 S.E.2d 757, 767-68 (1989),* cert. denied, *493 US. 1063, 107 L. Ed. 2d 963, 110 S.Ct. 880 (1990).* Another significant factor the trial court must consider is "the difficulty encountered in selecting a jury." *Mueller v. Commonwealth, 244 Va. 386, 398, 422 S.E.2d 380, 388 (1992),* cert. denied, *507 US. 1043, 123 L. Ed. 2d 498, 113 S.Ct. 1880 (1993).*

Roach did not overcome the presumption that he could receive a fair trial in Greene County. He concedes that only six members of the jury pool were so prejudiced by media coverage that they could not give him a fair trial. Given the relative ease with which the jury was selected, we hold that the trial court did not abuse its discretion in denying Roach's motion for a change of venue.

E. Jury Selection

Roach next argues that the trial court erred in refusing to strike for cause juror Breeden. During voir dire, juror Breeden testified that Daniel Bouton, the Commonwealth's Attorney, formerly had represented him in a legal matter. Although

Bouton was not representing Breeden in any matter at the time of trial, Breeden stated that he would regard Bouton as his personal attorney. Breeden also testified that his former connection with Bouton would not affect his ability to be impartial. Roach argues that this relationship presented an inherent 'conflict, and that Breeden was more likely to be influenced by Bouton's closing argument because he was accustomed to looking to Bouton for legal guidance.

The trial court's decision whether to strike a juror for cause is a matter submitted to its discretion and will not be disturbed on appeal unless the refusal constitutes manifest error. Stockton, *241 Va.. at 200, 402 S.E. 2d at 200.* Further, in *Calhoun v. Commonwealth, 226 Va. 256, 263, 307 S. E. 2d 896, 900 (1983),* we refused to adopt a per se rule disqualifying a juror solely because the juror had been represented by the Commonwealth's Attorney at some time in the past.

In the present case, the trial court had the opportunity to observe Breeden's demeanor when evaluating his statement that his ability to be impartial would not be affected by his former association with Bouton. Nothing in the record suggests that the trial court abused its discretion in accepting Breeden's statement that he could be impartial in the trial of the case. Thus, we find no merit in Roach's argument.[7]

VI. GUILT PHASE ISSUES

Roach argues that the trial court erred in refusing to set aside the verdict of capital murder based on the alleged absence of evidence corroborating his confession that he was the "triggerman." Roach asserts that his confession was inadequate as a matter of law to establish that he was the immediate

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[7] We also find no merit in Roach's claim that his Fourteenth Amendment rights were violated by the trial court's refusal to strike Breeden for cause. The record before us offers no support for such a claim.

perpetrator of the killing. In addition, Roach argues that the trial court erred in failing to instruct the jury that the "triggerman" portion of his confession had to be corroborated before he could be convicted of capital murder. He also assigns as error the court's refusal of an instruction defining a principal in the second degree, as well as its refusal of an instruction that only the immediate perpetrator of a killing can be convicted of capital murder. We disagree with the above assertions.

The Commonwealth need not corroborate an entire confession, but it must corroborate the elements of the corpus delicti. *Watkins, 238 Va.. at 348, 385 S.E.2d at 54.* In the present case, the Commonwealth met its burden of corroborating the corpus delicti of capital murder.

The corpus delicti of a homicide consists of "proof of the victim's death from the criminal act or agency of another person." *Swann v. Commonwealth, 247 Va. 222, 236, 441 S.E.2d 195, 205,* cert. denied, *115 S.Ct. 234 (1994).* The testimony of Dr. Kay, the medical examiner, established that Hughes died from a shotgun wound to the chest. There was no evidence that the wound was self-inflicted. Further, the Commonwealth produced evidence which tended to corroborate that Roach was the "triggerman" in the killing.

The Commonwealth showed that Roach owned a 12 gauge shotgun and that he had shot number eight shot from it the day before the murder. The shot and wadding retrieved from Hughes's chest were consistent with the type used in Roach's weapon. The Commonwealth also produced evidence taken from Hughes's car including a number eight shot shell casing, as well as latent fingerprints which matched Roach's fingerprints.

The corpus delicti of robbery, the predicate offense of this capital murder charge, was also corroborated by evidence independent of Roach's confession. The autopsy report revealed evidence of violent force used on Hughes, and the

videotape from the automatic teller machine showed Roach attempting to use Hughes's credit card. Further, as stated above, latent fingerprints matching Roach's fingerprints were found in Hughes's vehicle, which was taken from the murder scene.

Since the Commonwealth sufficiently corroborated the corpus delicti of capital murder, the trial court did not err in denying Roach's motion to set aside the verdict. Likewise, the court did not err in failing to instruct the jury that Roach's confession that he was the "triggerman" must be corroborated since the court had already correctly determined, as a matter of law, that the confession was sufficiently corroborated to go to the jury. See *Watkins, 238 Va. at 350-51, 385 S. E. 2d at 55.*

Finally, there was no error in the trial court's refusal to give a jury instruction that only the immediate perpetrator of the killing can be found guilty of capital murder. There was no evidence that Roach acted with an accomplice other than the first version of his confession, which he later recanted. Also, since his theory that an other person was the triggerman was unsupported by the evidence, Roach was not entitled to an instruction defining a principal in the second degree. See *Eaton v Commonwealth, 240 Va. 236, 255, 397 S. E. 2d 385, 397 (1990),* cert. denied, 502 US. *824, 116 L. Ed. 2d 60, 112 S.Ct. 88 (1991).*

V11. PENALTY PHASE ISSUES

Juror Question

Roach contends that the jury prematurely began deliberations during the penalty phase of the trial. In support of his claim, he notes that, after the jury had been instructed but before it began deliberating, one juror asked the trial court, "Does life in prison mean with no chance of parole or truly life in prison, or is he eligible for parole?"

At this point, Roach's counsel informed the trial court that "unless the possibility can be excluded that this question originated solely with one juror, the defense would respectfully move for a mistrial." The trial court declined to question the jury on the matter, but gave the jury an additional instruction stating, "Having found the defendant guilty, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourself with what may happen afterwards."

We find no merit in Roach's claim. The question posed by the individual juror does not indicate that the jury had begun deliberating Roach's penalty. Thus, the trial court did not abuse its discretion in denying the mistrial motion.

Jury Instructions

Roach argues that the trial court erred in refusing to instruct the jury on the meaning of the word "probability," in the context of the "future dangerousness" provision of Code § 19.2-264.2. We disagree. In *Mickens v. Commonwealth, 247 Va. 395, 403, 442 S.E.2d 678, 684,* vacated on other grounds, 513 U.S. _, 115 S.Ct. *307 (1994),* we held that the word "probability," as it appears in the statutory context of the "future dangerousness" predicate, is not ambiguous. Therefore, Roach was not entitled to a jury instruction defining that word. See *Louisi v. Commonwealth, 212 Va.. 848, 850, 188 S. E. 2d 206, 207, 208 (1972).*

Roach next asserts that he was denied his Fourteenth Amendment right of equal protection, because he was refused an instruction informing the jury that, if he received a life sentence on the capital murder charge, he would not be eligible for parole for 25 years. In contrast, Roach argues, certain "adjudicated recidivists" are entitled to an instruction informing the jury that they would be ineligible for parole if given a life sentence for the same offense. See *Simmons v. South Carolina, 512 U.S. 2198 (1994).*

As stated above, in applying the rule of Simmons, this Court has held that a defendant charged with capital murder is entitled to an instruction regarding parole eligibility only when (1) the defendant's future dangerousness is in issue, and (2) the defendant is ineligible for parole at the time he is sentenced on the capital murder charge. *Wright, 248 Va. at 487, 450 S.E.2d at 362.* Since Roach does not contend that he was ineligible for parole when he was sentenced, he was not entitled to an instruction regarding parole eligibility. Moreover, Roach has not suffered a denial of equal protection from the refusal of such an instruction, because a non-suspect classification is involved here and that classification "rationally advances a reasonable and identifiable governmental objective." *Schweiker v. Wilson, 450 U.S. 221, 235, 67L. Ed. 2d 186, 101 S.Ct. 1074 (1981);* see *Evans, 228 Va. at 481, 323 S.E.2d at 122.*

When a "recidivist" is ineligible for parole at the time of sentencing on a capital murder charge, this fact is relevant to the issue whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." See Code § 19.2-264.2(l). In contrast, the fact that Roach would be eligible for parole in 25 years is not probative of this issue. This fact could do nothing more than invite the jury to speculate on the effect incarceration might have on Roach. The elimination of such improper speculation provides a rational basis supporting the denial of the requested instruction. Thus, Roach's equal protection claim fails. See *Schweiker* at 235.

Standard of Proof for Future Dangerousness

Roach argues that, because this Court has never reversed a death sentence based on insufficiency of evidence of "future dangerousness," "Virginia cases articulate no standards to confine the reach of" that sentencing factor. Roach contends that such standards must be articulated.

We disagree, because the conclusion Roach urges ignores the central purpose of Code § 19.2-264.2, that of individualized consideration of the defendant and the crime committed. Under the direction of Code § 19.2 -264.2, the trier of fact may not impose the death penalty unless it finds "future dangerousness" beyond a reason-able doubt, upon consideration of all relevant evidence of the defendant's background, as well as the crime for which the defendant is being sentenced. This individualized consideration necessarily precludes the articulation of precise requirements for a finding of "future dangerousness." Moreover, a defendant is protected from an unsupported finding of "future dangerousness" by the right to appellate review of the sufficiency of the evidence in support of that finding.

Sufficiency of Evidence of "Future Dangerousness"

Under Code § 19.2-264.2, the death penalty may not be imposed unless the trier of fact shall find one or both of two aggravating factors we have referred to as "future dangerousness" and "vileness." *Yeatts v. Commonwealth, 242 Va. 121, 139, 410 S.E.2d 254, 265 (1991),* cert. denied, *503 U.S. 946, 117 L. Ed. 2d 639, 112 S.Ct. 1500 (1992).* In the present case, the jury found "future dangerousness," meaning "there is a probability that [Roach] would commit criminal acts of violence that would constitute a continuing serious threat to society." Code § 19.2-264.2.

Roach argues that the Commonwealth failed to produce sufficient proof of his "future dangerousness." He first emphasizes that the only expert psychological testimony at the penalty phase was given by Dr. Hawk, who stated that there was no pattern of violent behavior in Roach's life. Although he concedes that "all of [his] misconduct arguably involved potential for violence," Roach asserts that the Commonwealth never introduced evidence of any actual or threatened violence in his past behavior. He also notes that his misconduct occurred only during the period of his family's "disintegration."

Further, given his difficult family background and the fact that he had only one probation violation prior to December 3, 1993, Roach asserts that the jury's finding of "future dangerousness" is unsupported by the evidence. We disagree.

The evidence in the penalty phase showed that, within approximately a seven-month period prior to Roach's murder of Hughes, he had broken and entered a private residence, stolen a .357 Magnum pistol from that dwelling, committed two automobile larcenies, and violated a condition of his probation.

As this Court emphasized in Yeatts, burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation - the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. *242 Va.. at 140, 410 S.E.2d at 266* (citations omitted). Thus, Roach's commission of burglary, and his theft of a.357 Magnum pistol during the burglary, were relevant evidence in determining his "future dangerousness."[8] See id.

The jury also heard evidence from John Frey, Roach's probation officer, that Roach violated his probation in carrying a shotgun. Violent behavior arose from this probation violation when Roach used the shotgun to kill Mrs. Hughes. Therefore, both the fact of the violation and its particular nature were relevant evidence in the jury's determination of "future dangerousness."

Most significantly, this Court has recognized that the facts and circumstances surrounding the capital murder alone may

[8] The fact that the dwelling Roach broke and entered was unoccupied at the time of the offense is a fortuitous circumstance that does not affect our analysis here.

be sufficient to support a finding of "future dangerousness." See *Murphy v. Commonwealth*, 246 1h. 136, 145, 431 S. E. 2d 48, 53, cert. denied, 5 10 U. S. -, 114 S.Ct. 336 (1993). Here, Roach killed a defenseless, 70-year-old neighbor because he wanted her money. He admitted that Mrs. Hughes had always been kind to him. Yet, after shooting her at point-blank range, he walked past her body, robbed her of her money and car keys, and left her lying on the floor.

From this evidence, the jury was entitled to conclude that Roach placed little value on human life and was willing to kill even a defenseless friend in order not to be identified as the perpetrator of a robbery. Given Roach's escalating pattern of criminal behavior culminating in the murder of Mrs. Hughes, the jury had sufficient evidence from which to find, beyond a reasonable doubt, that there was a probability that Roach would commit criminal acts of violence that would constitute a continuing serious threat to society.

Our conclusion in this regard is not altered by Dr. Hawk's testimony. Although he testified that Roach had no pattern of violent behavior in his life, the jury was entitled to weigh this opinion in conjunction with all the evidence of Roach's criminal behavior, including the facts and circumstances surrounding his robbery and murder of Mrs. Hughes.

Roach also argues that the "trial court erred [by] finding that no good cause had been shown to set aside the sentence of death and impose a sentence of imprisonment for life." In reviewing the record pursuant to Code § 19.2-264.5, the trial court is vested with discretion, upon good cause shown, to set aside the sentence of death. Here, the record shows that the trial court reviewed all evidence presented in both mitigation and aggravation of the offense. Based on the evidence presented, we cannot conclude that the trial court erred in finding an absence of "good cause shown" to set aside the jury verdict of death and to impose a sentence of life imprisonment.

VIII. SENTENCE REVIEW

Under Code § 17-110. 1 (C)(1) and (2), we are required to determine "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

A. Passion and Prejudice

Roach contends that the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor. In support of his argument, he restates several of the errors assigned above. Since we have found no error in the trial court's rulings, we reject this argument. See *Pope v. Commonwealth,* 234 Va. 114, 127, 360 S.E.2d 352, 360 (1987), cert. denied, 485 U.S. 1015, 99 *L. Ed.* 2d 716, 108 S.Ct. 1489 (1988); *Wise v. Commonwealth,* 230 Va. 322, 335, 337 S.E. 2d 715, 723 (1985), cert. denied, 475 US. 1112, *89 L.* Ed. 2d 921, 106 S.Ct. 1524 (1986). Additionally, our independent review of the entire record fails to disclose that the jury's death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor." Code § 17-110.1(C).

B. Excessiveness and Proportionality

Roach contends that the death sentence is excessive and disproportionate to those imposed in similar cases. He argues that comparable death sentence cases involve "fact patterns more aggravated as to (1) surrounding circumstances of the offense, (2) age and background of the defendant and (3) unrebutted defense evidence offered in mitigation." With regard to evidence in mitigation, Roach relies primarily on Dr. Hawk's testimony and the other testimony concerning Roach's school, work, and family life.

In conducting the proportionality review, we consider "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." *Jenkins v. Commonwealth, 244 Va. 445, 461, 423 S.E.2d 360, 371 (1992),* cert. denied, 507 U.S. *1036, 123 L. Ed. 2d 483, 113 S.Ct. 1862 (1993).* With this purpose in mind, we have compared the record in 17, this case with the records in other capital murder cases to determine whether the death penalty imposed here is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code § 17-110. 1 (C)(2).

Here, the jury based its sentence of death only on the "future dangerousness" predicate. Therefore, in making our proportionality determination we have given particular consideration to other capital murder cases in which robbery was the underlying felony and the death penalty was based only on the "future dangerousness" predicate.

Those cases were compiled in *Yeatts, 242 Va. at 143, 410 S.E.2d at 267-68,* and supplemented in *Chichester v. Commonwealth, 248 Va. 311, 332-33, 448 S.E.2d 638, 652 (1994),* cert. denied, ___ U. S. ___, *115 S.Ct. 1134 (1995).* The following additional cases involving. robberies and findings of "future dangerousness" were decided after *Chichester* and have been considered by *us: Chandler v. Commonwealth, 249 Va. 270, 455 S.E.2d 219,* cert. denied, ___ U.S. ___, *116 S.Ct. 233 (1995); Joseph, 249 1b. 78, 452 S.E.2d 862.* We have also reviewed the records in capital murder cases in which robbery was the underlying offense and a sentence of life imprisonment was imposed.

Based on this review, we conclude that, while there are exceptions, juries in this Commonwealth generally impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes. Roach killed an elderly, defenseless friend with a shotgun at point blank range in the process of

robbing her of a portion of her social security funds. This crime, like the other death sentence crimes we have reviewed, shows extreme cruelty and lack of respect for human life.

In addition, although there was evidence in mitigation concerning Roach's status as a 17-year-old offender and his family background, the present case also involved significant evidence in aggravation of the offense. As stated above, Roach had been found guilty of four felonies in the seven-month period prior to the commission of this offense. Although he had been on supervised probation since August 1993, this rehabilitative measure did not deter Roach from carrying a weapon in violation of the terms of his probation. Moreover, his use of this weapon to kill Mrs. Hughes represented the ultimate failure of rehabilitative efforts on his behalf. Given this escalating pattern of criminal behavior, which culminated in the commission of the present offense, we conclude that the imposition of the death penalty in this case is neither excessive nor disproportionate to the penalty imposed in comparable cases.

IX. CONCLUSION

We find no reversible error in the issues presented here. Having reviewed Roach's sentence of death pursuant to Code § 17-110. 1, we decline to commute the sentence of death. Accordingly, we will affirm the judgment of the trial court.

Affirmed.

117 S.Ct. 365 (1996)

Steve Edward ROACH, petitioner,
v. VIRGINIA.
No. 96-5654.
Oct. 21, 1996

Case below, 251 Va. 324, 468 S.E.2d 98.

Petition for writ of certiorari to the Supreme Court of Virginia denied.

118 S.Ct. 713 (1998)

Steve Edward ROACH, petitioner,
v. Ronald J. ANGELONE, Virginia Department of Corrections.
No. 97-6601.
Jan. 12, 1998.

Petition for writ of certiorari to the Supreme Court of Virginia denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

STEVE EDWARD ROACH,	)	
	)	
Petitioner,	)	Civil Action No. 97-0693-R
	)	
v.	)	FINAL ORDER
	)	
RONALD ANGELONE,	)	By: Samuel G. Wilson
	)	
Respondent.	)	Chief United States District Judge
	)	

In accordance with the written Memorandum Opinion entered this day, it is hereby

ORDERED AND ADJUDGED

that Steve Edward Roach's petition under 28 U.S. C. § 2254 for writ of habeas corpus is hereby DISMISSED. This action is stricken from the active docket of the court.

ENTER: This 29th day of July, 1998.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

STEVE EDWARD ROACH,	)	
	)	
Petitioner,	)	Civil Action
	)	No. 97-0693-R
	)	MEMORANDUM
	)	OPINION
v.	)	
	)	
RONALD ANGELONE,	)	By: Samuel G.
	)	Wilson
Respondent.	)	Chief United
	)	States District
	)	Judge
	)	

Petitioner Steve Edward Roach brings this petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence of death for the capital murder of Mary Hughes. Roach was seventeen years old when he murdered and robbed Hughes, his elderly neighbor and friend. Although Roach concedes that he committed a terrible murder for which he deserves substantial punishment, he argues that the imposition of the death penalty on a juvenile offender with no prior history of physical acts of violence for a murder that involved no more than the minimum necessary to accomplish the act is unprecedented in Virginia. He maintains that his death sentence is unconstitutional for a variety of reasons. However persuasive the court finds Roach's arguments that the death penalty is not warranted in his case, this court cannot substitute its view of the facts for that of the jury that sentenced Roach to death or the state courts that imposed and affirmed the sentence. The court has conducted the limited review permissible in federal habeas and concludes

that Roach was not sentenced to death in violation of a clearly established constitutional right. Accordingly, the court must dismiss Roach's petition.

Roach does not dispute that he murdered and robbed Mary Hughes on the evening of December 3, 1993. Roach shot Hughes once in the chest as she stood at the front door of her home. He then stole her purse and her car. Roach fled in the car to North Carolina, where he attempted to withdraw cash from an automatic teller machine using one of Hughes' credit cards. Roach then continued on to South Carolina. When a South Carolina police officer stopped him for speeding, Roach ran into the woods. Roach subsequently returned to Virginia and turned himself in to the Sheriff's Department in Greene County. Although Roach initially told police that someone else shot Hughes, he eventually confessed to shooting and robbing Hughes.

The Commonwealth issued juvenile petitions against Roach for murder, robbery, and the use of a firearm in the commission of murder. On May 13, 1994, following a transfer hearing, the Greene County Juvenile and Domestic Relations Court ("the juvenile court") certified Roach to stand trial as an adult and transferred the matter to the Circuit Court of Greene County ("the trial court"). After the trial court remanded the case to the juvenile court for further proceedings, the juvenile court conducted a second transfer hearing and again certified Roach to stand trial as an adult. A Greene County grand jury indicted Roach on October 11, 1994, for capital murder in violation of Virginia Code § 18.2-31(4), robbery in violation of Virginia Code § 18.2-58, and the use of a firearm in the commission of murder in violation of Virginia Code § 18.2-53.

I.

The guilt phase of Roach's trial began on February 27, 1995. The jury found Roach guilty of all charges. The penalty phase of the trial took place on March 3, 1995. The jury found that Roach presented a future danger to society and

recommended a sentence of death.[1] On May 9, 1995, the trial court sentenced Roach to death in accordance with the jury's verdict. The trial court also sentenced Roach to life in prison for robbery and three years in prison for the use of a firearm in the commission of murder.

The Supreme Court of Virginia affirmed the judgment of the trial court on March 1, 1996, Roach v. Commonwealth, 468 S.E.2d 98 (Va. 1996), and denied rehearing on April 19, 1996. The United States Supreme Court denied Roach's petition for writ of certiorari on October 21, 1996. Roach v. Virginia, 117 S.Ct. 365 (1996). Roach then filed a petition for writ of habeas corpus in the Supreme Court of Virginia, That court dismissed the petition on April 30, 1997, and denied rehearing on August 1, 1997. On January 12, 1998, the United States Supreme Court denied Roach's petition for writ of certiorari. Roach v. Angelone 118 S.Ct. 713 (1998). Roach filed his amended federal petition in this court on March 9, 1998.

II.

Because Roach filed his federal petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"), the court must apply the AEDPA's deferential standard of review, See Lindh v. Murphy, 117 S.Ct. 2059, 2068 (1997). The AEDPA provides:

> An application for a writ of habeas corpus on behalf of person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that as adjudicated on the merits in State Court proceedings unless the adjudication of the claim –

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[1] The trial court found that the evidence to support the vileness predicate was insufficient as a matter of law and allowed the case to go to the jury on the future dangerousness predicate only.

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,

28 U.S.C. § 2254(d). Under subsection (1), a federal court may grant habeas relief on an issue only "when the state courts have decided the question by interpreting or applying the relevant [Supreme Court] precedent in a manner that reasonable jurists would all agree is unreasonable." Green v. French, 143 F.3d 865, 870 (4th Cir. 1998).

III.

Roach first argues that the trial court violated his right to due process when it failed to instruct the jury properly on the requirement of unanimity in sentencing. Roach raised this claim for the first time as claim I(H) in his petition for writ of habeas corpus in the Supreme Court of Virginia. The Supreme Court of Virginia found the claim procedurally barred under the rule of Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974) (holding that claims that could have been, but were not, raised on direct appeal are barred from consideration on habeas). If, as in this case, a state court expressly denies a claim based on an adequate and independent state procedural default rule, the claim is barred from federal review. Coleman v. Thompson, 501 U.S. 722, 728 (1991). The rule in Slayton provides an adequate and independent basis for barring federal review. Id. Therefore, the claim is now defaulted from federal review

absent a showing of actual innocence or cause and prejudice. Id. at 729-30.

Roach does not assert that he is actually innocent. Insofar as he argues ineffective assistance of counsel as cause for his procedural default, the court finds, for reasons stated in Section IX, infra, that his related ineffective assistance of counsel claim is without merit. Therefore, Roach's claim of ineffective assistance of counsel cannot establish cause to excuse his procedural default. See Murray v. Carrier, 477 U.S. 478, 488-89 (1986). Accordingly, the court must deny relief on this claim.

IV.

Next, Roach argues that he was denied due process in violation of the Fourteenth Amendment when the trial court failed to instruct the jury that Roach, if sentenced to life in prison, would not be eligible for parole under Virginia law for twenty-five years.[2] In Simmons v. South Carolina, 512 U.S. 154 (1994), the United States Supreme Court held that, when the state seeks the death penalty based on a defendant's future dangerousness, the defendant has a due process right under the Fourteenth Amendment to inform the jury, either through argument or instruction, that he is ineligible for parole as a matter of law, Id. at 162. Roach now argues that he was entitled, pursuant to the holding in Simmons, to inform the jury that he would not be eligible for parole for twenty-five years if it recommended a life sentence.

When Roach raised this claim on direct appeal, the Supreme Court of Virginia held that Roach was not entitled to

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[2] Following instructions at the penalty phase of the trial, a juror inquired, "Does life in prison mean with no chance of parole or truly life in prison, or is he eligible for parole?" (Tr. March 3, 1995 at 1085). In response to this question, the trial court instructed the jury that it should "impose such punishment as [it feels] is just under the evidence and within the instructions of the Court" and advised the jury "not to concern [itself] with what may happen afterwards. " (Tr. March 3, 1995 at 1089).

an instruction regarding his parole eligibility. Roach, 468 S.E.2d at 105. Relying on its prior decision in Joseph v. Commonwealth, 452 S. E. 2d 862 (Va. 1995), the Supreme Court of Virginia held that the rule of Simmons applied only if the defendant was ineligible for parole. Roach, 468 S.E.2d at 111. The court concluded that Roach, who would be eligible for parole after serving twenty-five years, was not entitled to an instruction regarding his parole eligibility. Id.

To obtain relief on this claim, Roach must demonstrate that no reasonable jurist could interpret the rule of Simmons as limited to those defendants who are ineligible for parole under state law. See Green, 143 F.3d at 870. Roach has not met this burden. First, the court observes that strong support for the Supreme Court of Virginia's interpretation of Simmons is found in the text of the Simmons opinion itself. The holding of Simmons is defined by Justice O'Connor's concurring opinion. Townes Y. Murray 68 F.3d 840, 849-50 (4th Cir. 1995). Justice O'Connor wrote, "In a state in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact. " Simmons, 5 12 U.S. at 176 (O'Connor, J., concurring). In addition, several federal courts interpreting Simmons have limited its application to defendants who are ineligible for parole. See Allridge v. Scott, 41 F.3d 213, 221-222 (5th Cir. 1994); see also Ingram v. Zant, 26 F.3d 1047, 1054 n.5 (11th Cir. 1994). These decisions, as well as the text of Simmons itself, demonstrate that the Supreme Court of Virginia's decision was reasonable. See Fitzgerald v. Green, 1998 WL 388405, at *8 (4th Cir. July 13, 1998) (rejecting similar claim).

A recent opinion by Justice -Stevens offers some support for Roach's position that the rule of Simmons should apply to defendants who are eligible for parole. Justice Stevens, joined by three other justices, noted the "obvious tension" between Simmons and a Texas law prohibiting defendants who are eligible for parole from presenting evidence regarding their parole eligibility to the jury. Brown v. Texas, 118 S.Ct. 355

(1997) (opinion of Stevens, J., respecting denial of certiorari). The Brown opinion only confirms that the correct interpretation of Simmons is open to debate among reasonable jurists. However compelling Roach's argument that the logic behind the decision in Simmons applies equally to his case, the court cannot find that the interpretation of Simmons adopted by the Supreme Court of Virginia is contrary to, or an unreasonable application of, clearly established federal law as deter-mined by the United States Supreme Court. Accordingly, the court must deny relief on this claim.

V.

Roach next asserts that Virginia's juvenile transfer policy violates the Eighth Amendment because it does not require judicial consideration of a juvenile defendant's maturity and moral responsibility before he is compelled to stand trial as an adult for capital murder. The Supreme Court of Virginia rejected this claim based on its prior decisions in Wright v. Commonwealth, 427 S.E.2d 379 (Va. 1993), vacated on other grounds, 114 S.Ct, 2701 (1994), and Thomas v. Commonwealth, 419 S.E.2d 606 (Va. 1992). In these cases, the Supreme Court of Virginia held that "the Constitution does not require transfer hearings or additional procedural safeguards for juveniles tried for capital offenses." Wright, 427 S.E.2d at 384 (citing Thomas, 419 S.E.2d at 609). Roach cannot obtain relief on this claim unless he demonstrates that this holding by the Supreme Court of Virginia was unreasonable in light of clearly established federal law as decided by the United States Supreme Court. See Green, 143 F.3d at 870. Notwithstanding Roach's assertions to the contrary, the United States Supreme Court has never expressly held that a juvenile capital offender is entitled to individualized consideration of his moral culpability prior to standing trial as an adult. Roach's reliance on a single statement in Justice Scalia's opinion in Stanford v. Kentucky, 492 U.S. 361 (1989), is unavailing. In Stanford, the Supreme Court addressed whether the Eighth Amendment prohibits the execution of sixteen- or seventeen-year-old capital offenders. Justice Scalia,

discussing why laws that prohibit persons under age eighteen from engaging in conduct such as drinking alcoholic beverages or driving were not relevant to the issue before the Court, noted that the criminal justice system provides individualized consideration of a defendant's maturity. Justice Scalia observed:

> In the realm of capital punishment in particular, "individualized consideration [is] a constitutional requirement," Lockett v. Ohio, 438 U.S. 586, 605 (1978) (opinion of Burger, C.J.) (footnote omitted); see also Zant v. Stephens, 462 U.S. 862, 879 (1983) (collecting cases), and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age, see Eddings v Oklahoma, 455 U.S. 104, 115-116 (1982). Twenty-nine States ... have codified this constitutional requirement in laws specifically designating the defendant's age as a mitigating factor in capital cases. Moreover, the determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of 16- and 17 year-old offenders before they are even held to stand trial as adults.

Id. at 375 (footnotes omitted). Justice Scalia did not state that juvenile transfer statutes which do not provide for individualized consideration violate the Constitution. A reasonable jurist could conclude, therefore, that the Constitution does not require a judicial determination of a juvenile offender's moral culpability and maturity before the state may try the juvenile as an adult for a capital crime.[3] In fact, based on Justice Scalia's reference to the individualized

[3] The court also notes that the portion of Justice Scalia's opinion on which Roach relies is joined by only three other justices.

consideration given to a capital defendant's age at sentencing, the Supreme Court of Virginia reasonably could have concluded that Virginia's capital sentencing scheme, which provides that age may be considered as a mitigating factor at sentencing, satisfied the constitutional requirement of individualized consideration.[4] The court concludes that Roach has not demonstrated that the Supreme Court of Virginia's adjudication of this claim conflicted with clearly established federal law as decided by the United States Supreme Court. The court, accordingly, must deny relief on this claim.

VI.

Next, Roach alleges that he was denied due process in violation of the Fourteenth Amendment when the trial court refused to "life-qualify" the jury. Roach first raised this claim in his petition for writ of habeas corpus in the Supreme Court of Virginia as claim I(B). The Supreme Court of Virginia, applying the rule in Slayton, found the claim to be procedurally defaulted. The claim, therefore, is barred from federal review absent a showing of actual innocence or cause and prejudice. See Coleman, 501 U.S. at 728. Roach does not claim actual innocence and, for reasons discussed in Section IX, infra, the court finds that his related ineffective assistance of counsel claim is meritless. Roach thus has failed to overcome his procedural default, Murray, 477 U.S. at 489-90, and the court denies relief on this claim.

VII.

Roach next challenges the sufficiency of the evidence to prove future dangerousness. To establish the existence of this aggravating factor, the Commonwealth must prove beyond a reasonable doubt "a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society, " Va. Code § 19.2-264.2 (Michie 1995).

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[4] Virginia Code § 19.2-264.4(B) provides that the defendant's age at the time of the offense may be considered as a mitigating factor.

A district court reviews the sufficiency of the evidence to prove an aggravating factor under the standard of review established in Jackson v. Virginia, 443 U.S. 307 (1979). See Turner v. Williams, 35 F.3d 872, 894 (4th Cir. 1994). Under this standard, the court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements ... beyond a reasonable doubt." Jackson, 443 U.S. at 319. The district court must not substitute its view of the facts for that of the fact-finder. Tuggle v. Thompson, 57 F.3d 1356, 1369 (4th Cir.), vacated on other grounds, 516 U.S. 10 (1995).

At the penalty phase of Roach's trial, the jury heard evidence that, during the seven-month period preceding the murder of Hughes, Roach broke and entered a residence from which he stole a .357 Magnum pistol, twice committed larceny of an automobile, and violated the conditions of his probation by carrying a shotgun, which he later used to murder Hughes. The jury could also consider the evidence of the capital murder itself, which involved the killing for money of an elderly woman whom Roach considered his friend. As the Supreme Court of Virginia concluded, a reasonable jury could find, based on this evidence, that "Roach placed little value on human life and was willing to kill even a defenseless friend in order not to be identified as the perpetrator of a robbery." Roach, 468 S.E.2d at 112.

Roach argues that this evidence was insufficient to prove future dangerousness because his conduct, however egregious, involved nothing more than the minimum necessary to accomplish the murder, and his criminal history included no prior physical acts of violence. Although this court might not have reached the same conclusion as the fact finder in this case, this court must not substitute its view of the evidence for that of the jury." See Tuggle, 57 F.3d at 1369. The court cannot find that the Supreme Court of Virginia's conclusion that this evidence, viewed in the light most favorable to the Commonwealth, was sufficient to prove future dangerousness

conflicted with clearly established federal law as determined by the United States Supreme Court. Accordingly, the court must deny relief on this claim.[5]

VIII.

Roach next argues that the Supreme Court of Virginia failed to conduct meaningful proportionality review of his sentence in violation of the Eighth and Fourteenth Amendments. Insofar as Roach argues that the Eighth Amendment requires states to conduct proportionality review of death sentences, his argument is without merit. Proportionality review is not mandated under the United States Constitution, Pulley v. Harris, 465 U.S. 37, 50-51 (1984). Also without merit is Roach's argument that the failure of the Supreme Court of Virginia to conduct the state-mandated proportionality review in a meaningful manner constitutes a violation of the due process clause of the Fourteenth Amendment. The inadequacy of state court's proportionality review is not a valid ground for federal habeas relief. Buchanan v. Angelone, 103 F.3d 344, 350-51 (4th Cir. 1996), aff'd, 118 S.Ct. 757 (1998); See Peterson v. Murray, 904 F.2d 882, 887 (4th Cir. 1990) (state court's erroneous application of state law is not a grounds for federal habeas relief).

Even assuming that the failure by the Supreme Court of Virginia to conduct its proportionality review in a meaningful manner could, under some circumstances, amount to a violation of the Fourteenth Amendment, Roach has not demonstrated that the Supreme Court of Virginia's review of Roach's sentence was so deficient as to amount to a federal constitutional violation. Under Virginia law, the Supreme Court of Virginia reviews every death sentence to determine:

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[5] Insofar as Roach argues that Virginia's future dangerousness aggravating factor is unconstitutional because it fails to channel or limit a jury's discretion to impose the death penalty, his argument is meritless. See Giarratano v. Procunier, 891 F.2d 483, 489-90 (4th Cir. 1989) (holding that Virginia's future dangerousness predicate is constitutional).

> 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Va. Code § 17-110.1 (C). The Supreme Court of Virginia compared Roach's case with the record of other capital murder cases in Virginia, giving "particular consideration to other capital murder cases in which robbery was the underlying felony and the death penalty was based only on the 'future dangerousness' predicate." Roach, 468 S.E.2d at 113. Contrary to Roach's assertions, the Supreme Court of Virginia also "reviewed the records in other capital murder cases in which robbery was the underlying offense and a sentence of life imprisonment was imposed." Id. In addition, the Supreme Court of Virginia considered the mitigating factors in Roach's case, including his young age and unstable family background. Id. at 114. Having reviewed all of these factors, the Supreme Court of Virginia concluded that Roach's sentence was "neither excessive nor disproportionate to the penalty imposed in comparable cases." Id.

The record thus demonstrates that the Supreme Court of Virginia conducted a thorough review of Roach's sentence in compliance with Virginia law. Although this court may view this matter differently, it may not review the state court's good-faith finding that the death sentence was not disproportionate or excessive when compared to the sentence imposed in similar cases. See Walton v. Arizona, 497 U.S. 639, 655-56 (1990). Accordingly, the court must deny relief on this claim.

IX.

Roach next asserts that he was denied the effective assistance of counsel in violation of the Sixth Amendment when his attorneys failed to argue on direct appeal that the trial court violated his due process rights by failing to instruct the jury properly on the requirement of unanimity in sentencing and by failing to "life-qualify" the jury. The respondent argues that these claims are procedurally defaulted because Roach did not raise these specific claims in his state habeas petition. The court agrees.

In his state habeas petition, Roach argued that he was denied the effective assistance of counsel when his attorneys failed to object to these issues at trial. He also alleged in claim II(EE) that, he was denied the effective assistance of counsel on direct appeal, but he failed to allege specific facts in support of his claim. In his petition for rehearing of his state habeas petition, Roach argued that his attorneys were ineffective for failing to raise on appeal each of the claims that the Supreme Court of Virginia found barred from habeas review under Slayton.

Before a habeas petitioner may obtain relief on a claim in federal court, he first must exhaust his state remedies. 28 U.S.C. § 2254(b)(1). A claim is not exhausted until the petitioner has "fairly presented" his claim to the state's highest court. Picard v. Connor, 404 U.S. 270, 275-78 (1971). The petitioner must have presented the substance of the claim, including the facts underlying the claim, to the state court. Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir.), cert. denied, 118 S.Ct. 102 (1997).

The court finds that Roach has not fairly presented his claims of ineffective assistance of appellate counsel to the Supreme Court of Virginia. In his petition, Roach did not refer to the specific claims that he believed his attorneys should have raised on appeal. Although Roach argued, albeit in conclusory fashion, in his petition for rehearing that his attorneys were ineffective for failing to raise the claims deemed barred from

habeas review under Slayton by the Supreme Court of Virginia, he still failed to set forth with any precision the legal or factual basis for his claims. The court, accordingly, concludes that Roach has failed to exhaust his state remedies as to his claims of ineffective assistance of appellate counsel.

If the petitioner has not exhausted his available state remedies, a federal court ordinarily should dismiss without prejudice the petitioner's claim for habeas corpus relief to permit the petitioner to exhaust his state remedies. Preiser v. Rodriguez, 411 U.S. 475 (1973). A federal court, however, need not dismiss the claim without prejudice if it is clear that state law would bar review of the claim in state court. If a nonexhausted claim is barred from review in state court, the claim is also barred from federal review. Gray v. Netherland, 518 U.S. 152, 161-62 (1996); Bassette v. Thompson, 915 F.2d 932, 936 (4th Cir. 1990).

If Roach were now to raise his ineffective assistance claims in state court in a second petition for writ of habeas corpus, it is clear that the Supreme Court of Virginia would find the claims procedurally barred. In Virginia, a petitioner may not raise a claim in a successive habeas corpus petition if the facts giving rise to the claim were known by or available to the petitioner at the time he filed his original petition. Va. Code § 8.01-654(B)(2). Roach's ineffective assistance of counsel claims are not based on facts that were unavailable at the time he filed his first petition for writ of habeas corpus. Therefore, to the extent that Roach failed to raise these claims in state court, the claims are barred from federal review. See Gray, 518 U.S. at 161-62.

Even assuming that Roach's presentation of these claims in state habeas was sufficient to exhaust his state remedies, the court finds that the Supreme Court of Virginia's adjudication of these claims was reasonable under 28 U.S.C. § 2254(d). To demonstrate that he has been denied his Sixth Amendment right to the effective assistance of counsel,

petitioner must satisfy the two-prong test announced in Strickland v. Washington, 466 U.S. 668 (1984). First, he must show that his counsel's representation fell below an objective standard of reasonableness. Id. at 688. In determining whether a petitioner has made this showing, the court begins with the strong presumption that counsel's conduct was within the wide range of objectively reasonable assistance. Evans v. Thompson, 881 F.2d 117, 123-24 (4th Cir. 1989). Second, petitioner must show that his attorney's conduct prejudiced him to the extent that it deprived him of a fair trial. Strickland, 466 U.S. at 689. He must establish that, but for his attorney's alleged deficient performance, there is a reasonable probability that the result of the proceedings would have been different. Id. A reasonable probability is one that undermines confidence in the outcome of the proceeding. Id.

Roach first alleges that his attorneys rendered ineffective assistance on direct appeal when they failed to argue that the trial court improperly instructed the jury on the requirement of unanimity at the penalty phase of the trial. The trial court instructed the jury as follows:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life, or to imprisonment for life and a fine of a specific amount, but not more than one hundred thousand dollars ($100,000). Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravating circumstance, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society. If you find from the evidence that the Commonwealth has proved that

> circumstance beyond a reasonable doubt, then you may fix the punishment of the defendant at death, but if you believe from all of the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at, one, imprisonment for life, or two, imprisonment for life and a fine of a specific amount, but not more than one hundred thousand dollars ($100,000). If the Commonwealth has failed to prove that circumstances beyond a reasonable doubt, then you shall fix the punishment of the defendant at, one, imprisonment for life, or two, imprisonment for life and a fine for a specific amount but not more than one hundred thousand dollars ($100,000). Any decision you make regarding punishment must be unanimous.
>
> If you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you should consider any evidence presented of circumstances which do not justify or excuse the offense, but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment.

(Tr. March 3, 1995 at 1082-1083). Roach argues that the trial court failed to instruct the jury that Virginia law provides for a sentence of life imprisonment if the jury at the penalty phase of a capital murder trial is unable to reach a unanimous verdict, see Va. Code § 19.2-264.4(E), and effectively instructed the jury that a finding of mitigation must be unanimous. He maintains that trial court's unanimity instruction, in combination with its failure to instruct the jury of the consequences of its failure to reach a unanimous verdict, violated his Eighth and Fourteenth Amendment rights under

the holdings of McKoy v. North Carolina, 494 U.S. 493 (1990), and Mills v. Maryland, 486 U.S. 367 (1988), by precluding the jury from considering mitigating evidence. He argues his attorneys were ineffective for not raising this claim on direct appeal.

In Mills and McKoy, the Supreme Court found instructions unconstitutional that informed a jury that a finding as to the existence of a mitigating circumstance must be unanimous. Both Mills and McKoy involved capital sentencing schemes whereby the jury was required to make a finding as to the existence of specific mitigating circumstances. McKoy, 494 U.S. at 436; Mills, 486 U.S. at 370. The Supreme Court held that, under such circumstances, it was unconstitutional to instruct the jury that its finding as to the existence of each mitigating circumstance must be unanimous. McKoy, 494 U.S. at 444; Mills, 486 U.S. at 384. A jury instruction violates the holding in McKoy if there is a "reasonable probability" that the jury applied the instruction in such 16 a way as to preclude its consideration of mitigating evidence. Williams v. French, ___ F.3d ___, 1998 WL 246105, at * 10 (4th Cir. May 18, 1998) (citing Boyde v. California, 494 U.S. 370, 380 (1990).

In contrast to the capital sentencing schemes at issue in Mills and McKoy, the capital sentencing scheme in Virginia does not require jurors to make findings as to the existence of particular mitigating circumstances. In Roach's case, the trial court instructed the jury to "consider any evidence presented of circumstances which. ... in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment." Unlike the juries Mills and McKoy, the jury in Roach's case was instructed to consider all mitigating evidence and was not required to make specific findings regarding enumerated mitigating circumstances. Because the jurors in Roach's case were not required to make an explicit decision regarding specific mitigating factors, it is unlikely that the general unanimity instruction given in Roach's case prevented the jury from considering and giving effect to the mitigating evidence.

Moreover, the verdict form used in Roach's case stated that the jury's decision had to be unanimous only with regard to a finding of future dangerousness and a decision to impose a death sentence. The verdict form indicated that the jury had to consider all of the mitigating evidence presented and did not limit the jury's consideration of mitigating evidence in anyway.[6]

---

[6] The verdict form provided to the jury read as follows:

We, the jury, on the issue joined, having found the Defendant, guilty of the willful, deliberate, and premeditated killing of a person in the commission of robbery while armed with a deadly weapon, and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

_____

Foreperson

or

We, the jury, on the issue joined, having found the Defendant, guilty of the willful, deliberate, and premeditated killing of a person in the commission of robbery while armed with a deadly weapon, and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

_____

Foreperson

or

We, the jury, on the issue joined, having found the Defendant, guilty of the willful, deliberate, and premeditated killing of a person in the commission of robbery while armed with w deadly weapon, and having considered all of the evidence in

The Court finds that the instruction, when considered in conjunction with the verdict form, did not create a "reasonable probability" that the jury applied the instruction in such a way as to preclude its consideration of mitigating evidence. See Williams, 1998 WL 246105, at *10. Accordingly, to the extent that the Supreme Court of Virginia addressed this claim on the merits, its adjudication of the claim was reasonable under Strickland.

Roach also alleges that his attorneys rendered ineffective assistance when they did not argue on appeal that the trial court failed to "life-qualify" the jury in violation of Roach's rights under the Sixth, Eighth, and Fourteenth Amendments. The trial court asked the prospective jurors the following three questions:

> (1) Do you have any belief or opinion which would prevent or substantially impair you from voting to find a defendant guilty of capital murder because a possible sentence is death?
>
> (2) Do you have any belief or opinion which would prevent you from voting or even considering voting for the death penalty if the jury has found the defendant guilty of capital murder?
>
> (3) Do you have any belief or opinion which would prevent or substantially impair you from voting for a sentence of less than death if the

---

aggravation and mitigation of such offense, fix his punishment at imprisonment for life and a fine of $_____
(fine must not be more than $100,000.00).

_____
Foreperson

jury has found the defendant guilty of capital murder?

(Tr. Feb. 28, 1995 at 46-48).

Roach argues that the trial court violated his right under the Sixth and Fourteenth Amendments to an impartial jury when it asked only a single life-qualifying question, In Mackall v. Angelone, 131 F.3d 442, 451 (4th Cir. 1997) (en banc), the Fourth Circuit found questions substantially similar to those posed in Roach's case adequate under the Sixth and Fourteenth Amendments. For the same reasons, this court concludes that the trial court's voir dire in this case did not violate Roach's Sixth and Fourteenth Amendment rights. The court finds unpersuasive Roach's assertion that the numerical disparity between the life-qualifying question and the death-qualifying questions prejudiced Roach and denied him an impartial jury. Certainly, the Supreme Court of Virginia reasonably could conclude that the attorneys' failure to argue on appeal that the numerical disparity violated Roach's constitutional rights did not amount to ineffective assistance of counsel under Strickland.

Roach also argues that he had a right, under the Eighth Amendment, to question prospective jurors regarding their views on mitigating evidence to ensure that the jurors' personal views would not prevent them from considering mitigating evidence. He asserts that his attorneys' failure to raise this issue on appeal constituted ineffective assistance of counsel. Roach, however, has not cited any case which holds that a defendant's Eighth Amendment right to have the jury consider mitigating evidence includes a right to engage in voir dire of jurors regarding their views on mitigating evidence. Because Roach has not shown that the trial court's voir dire violated his constitutional rights, he has not shown either deficient performance by his attorneys or prejudice. Therefore, to the extent that this claim was properly raised in state habeas, the court concludes that the Supreme Court of Virginia's

adjudication of the claim did not conflict with clearly established law as decided by the United States Supreme Court.

X.

This young man committed a disturbing crime, and a jury of his peers has recommended, the state trial judge has imposed, and the Supreme Court of Virginia has affirmed a disturbing sentence. Competent, dedicated counsel have represented him in this proceeding, and the court has thoroughly examined the record for cognizable, prejudicial, constitutional error. Finding none, the court is constrained to dismiss his petition.

An appropriate order will be entered this day.

ENTER: This 29th day of July, 1998.

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 1, 1999

No. 98-26
CA-97-693-R

STEVEN EDWARD ROACH
Petitioner - Appellant

v.

RONALD ANGELONE, Director, Virginia Department of Corrections
Respondent - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

VIRGINIA:
IN THE CIRCUIT COURT OF GREENE COUNTY

COMMONWEALTH OF VIRGINIA,

v.

FILE NO.
94-31

STEVE EDWARD ROACH,
Defendant.

ORDER

Pursuant to Section 53.1-232.1(iii) of the Code of Virginia, having determine that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Steve Edward Roach be carried out on the 25th day of August, 1999, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before August 25, 1999, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

The Honorable Daniel R. Bouton
Commonwealth's Attorney
Greene County
P. 0. Box 368
Stanardsville, Virginia 22973

Steven Schneebaum, Esquire
PATTON BOGGS L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037

Robert Q. Harris
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Pursuant to Rule 1:13, Rules of the Supreme Court of Virginia, the Court dispenses with the endorsements of counsel.

Entered this 29th day of June 1999.

_____

Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday 6th *day of A*ugust, 1999.

Steve Edward Roach,
Appellant,

against

Record No. 991817
Circuit Court No.
Criminal) 94-31

Commonwealth of Virginia,
Appellee.

From the Circuit Court of Greene County

Upon consideration of the petition of Steve Edward Roach, an appeal is awarded him from a judgment rendered by the Circuit Court of Greene County on the 30th day of July, 1999; no security being required.

It is further ordered that appellant's opening brief be filed no later than August 20, 1999; that appellee's brief be filed no later than September 3, 1999; and appellant's reply brief, if any, shall be filed no later than September 10, 1999.

This case is consolidated with the case of Steve Edward Roach v. Commonwealth of Virginia, Record No. 991816.

A Copy,
Teste:
David B. Beach, Clerk
By:
Deputy Clerk

CERTIFICATE OF APPEAL

Pursuant to Rule 5:23, 1, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that on August 6, 1999 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the lower court indicated in the order and to all counsel of record.

Given under my hand this 6th day of August, 1999.

David B. Beach, Clerk
By:
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday 6th *day of A*ugust, 1999.

Steve Edward Roach,
Petitioner,

against Record No. 991816

Director of the Department
of Corrections,
Respondent.

Upon a Petition for a Writ of Habeas Corpus

On August 3, 1999 came the petitioner, by counsel, and filed an emergency motion for a stay of execution.

Thereupon came the respondent, by the Attorney General of Virginia, and filed a response in opposition thereto.

On consideration whereof, the Court grants the motion and the execution is stayed.

A Copy,
Teste:
David B. Beach,
Clerk
By:
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday 6th *day of* August, 1999.

Steve Edward Roach,
Petitioner,

against Record No. 991816

Director of the Department
of Corrections,
Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the pleadings filed herein, it is ordered that this case be docketed and placed on the privileged docket of this Court for the September, 1999 session.

It is further ordered that petitioner's opening brief be filed no later than August 20, 1999; that respondent's brief be filed no later than September 3, 1999; and petitioner's reply brief, if any, shall be filed no later than September 10, 1999.

This case is consolidated with the case of Steve Edward Roach v. Commonwealth of Virginia, Record No. 991817.

A Copy,
Teste:
David B. Beach, Clerk
By: Deputy Clerk

28 USC § 2254

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retrospective to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce the part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Supreme Court, U.S.
FILED
SEP 23 1999
OFFICE OF THE CLERK

(2)

No. 99-375

In The

Supreme Court of the United States

STEVE EDWARD ROACH,

Petitioner,

v.

DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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2 PP

QUESTIONS PRESENTED

1. Does Roach's "proportionality review" claim fail to raise a cognizable federal issue?

2. Is there any "compelling" reason to review the Fourth Circuit's fact-specific conclusion that there was sufficient evidence to support the jury's "future dangerousness" finding?

3. Would petitioner's request to extend *Simmons v. South Carolina* to cover a capital defendant who was ***eligible*** for parole require the creation of an impermissible "new rule?"

4. Is there any "compelling" reason to review Roach's defaulted claim challenging the jury instruction requiring a unanimous sentence decision?

5. Would acceptance of Roach's claim – that the Constitution requires an assessment of maturity and culpability prior to transferring a juvenile for trial as an adult – violate the "new rule" doctrine?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. Prior Proceedings 1

B. Facts of the Offenses 2

REASONS TO DENY CERTIORARI 6

I. THE FOURTH CIRCUIT'S RULING THAT ROACH'S "PROPORTIONALITY REVIEW" CLAIM RAISED ONLY A MATTER OF STATE LAW, AND THAT THE VIRGINIA SUPREME COURT'S GOOD FAITH APPLICATION OF STATE LAW RAISED NO DUE PROCESS ISSUE, PRESENTS NO COMPELLING REASONS FOR REVIEW 6

II. THE FOURTH CIRCUIT'S RULING UPHOLDING THE STATE COURT'S FINDING OF SUFFICIENT EVIDENCE TO SUPPORT THE "FUTURE DANGEROUSNESS" AGGRAVATING CIRCUMSTANCE DOES NOT WARRANT REVIEW 11

III. ROACH'S "PAROLE ELIGIBILITY" CLAIM WAS CORRECTLY REJECTED BY THE FOURTH CIRCUIT AND, IF ACCEPTED, WOULD VIOLATE THE "NEW RULE" DOCTRINE 12

IV. ROACH'S DEFAULTED CLAIM ATTACKING THE SENTENCING INSTRUCTION PRESENTS NO COMPELLING REASON FOR REVIEW 14

V. THE FOURTH CIRCUIT RULED CORRECTLY THAT NO ADDITIONAL ASSESSMENTS OF A JUVENILE'S MATURITY ARE CONSTITUTIONALLY REQUIRED BEFORE TRANSFER FOR TRIAL AS AN ADULT 15

TABLE OF CONTENTS – Continued

Page

CONCLUSION 17

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997) 13

Boyd v. Johnson, 169 F.3d 907 (5th Cir. 1999) 13

Caspari v. Bohlen, 510 U.S. 383 (1994) 10, 17

Eaton v. Commonwealth, 397 S.E.2d 385 (Va. 1990), *cert. denied*, 502 U.S. 824 (1991) 15

Evitts v. Lucey, 469 U.S. 387 (1985) 10

Johnson v. Texas, 509 U.S. 350 (1993) 17

Jones v. United States, 119 S.Ct. 2090 (1999) 15

Lowenfield v. Phelps, 484 U.S. 231 (1988) 8

Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir. 1996), *rev'd on other grounds*, 519 U.S. 1030 (1997) 10

McCleskey v. Kemp, 481 U.S. 279 (1987) 8

Murphy v. Commonwealth, 431 S.E.2d 48 (Va.), *cert. denied*, 510 U.S. 928 (1993) 11

O'Dell v. Netherland, 521 U.S. 151 (1997) 14

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1988) 10

Pennsylvania v. Finley, 481 U.S. 551 (1987) 10

Pulley v. Harris, 465 U.S. 37 (1984) 7, 8

Roach v. Angelone, 176 F.3d 210 (4th Cir. 1999) 1

Roach v. Commonwealth, 468 S.E.2d 98 (Va. 1996) 1, 6, 9, 12, 13, 16

Roach v. Virginia, 519 U.S. 951 (1996) 1

Roach v. Warden, Record No. 962568 1

TABLE OF AUTHORITIES – Continued

Page

Simmons v. South Carolina, 512 U.S. 154 (1994)....13, 14

Spencer v. Commonwealth, 384 S.E.2d 785 (Va. 1989), *cert. denied*, 493 U.S. 1093 (1990) 15

Stanford v. Kentucky, 492 U.S. 361 (1989)..... 16

Sumner v. Mata, 449 U.S. 539 (1981)..... 6

Teague v. Lane, 489 U.S. 288 (1984) 10, 17

Thomas v. Commonwealth, 419 S.E.2d 606 (Va. 1992) 16

Tuilaepa v. California, 512 U.S. 967 (1994) 7

Turner v. Commonwealth, 364 S.E.2d 483 (Va.), *cert. denied*, 486 U.S. 1017 (1988)..... 9

Walton v. Arizona, 497 U.S. 634 (1990)..... 8, 9, 10

Wilson v. Greene, 155 F.3d 396 (4th Cir.), *cert. denied*, 119 S.Ct. 536 (1998) 13

Wright v. Commonwealth, 427 S.E.2d 379 (Va. 1993) 16

STATUTES AND RULES

28 U.S.C. § 2254(e)(1)..... 6

§ 17-110.1(C)(2), Code of Virginia 7

§ 17.1-313(C)(2), Code of Virginia 7

§ 18.2-31, Code of Virginia..... 8

§ 19.2-264.4, Code of Virginia.....8, 11

§ 19.2-264.4(B)(v), Code of Virginia..... 16

§ 19.2-264.4(C), Code of Virginia 1

§ 19.2-264.4(E), Code of Virginia 14, 15

§ 53.1-232.1(iii), Code of Virginia..... 2

STATEMENT OF THE CASE

A. Prior Proceedings

It is undisputed that Steve Edward Roach murdered 74-year-old Mary Ann Hughes on December 3, 1993, by shooting her in the chest with a shotgun. Roach was convicted by a Greene County, Virginia, jury of capital murder, robbery, and use of a firearm, on March 2, 1995. A separate sentencing proceeding was held on March 3, 1995, and the jury imposed the death sentence, finding the "future dangerousness" aggravating factor. Va. Code § 19.2-264.4(C). The trial court imposed the death sentence on May 18, 1995. The Virginia Supreme Court affirmed Roach's convictions and death sentence on March 1, 1996. *Roach v. Commonwealth*, 468 S.E.2d 98 (Va. 1996). This Court denied certiorari on October 21, 1996. *Roach v. Virginia*, 519 U.S. 951 (1996).

Roach's state habeas corpus petition was dismissed by the Virginia Supreme Court on April 30, 1997, and his petition for rehearing was denied on August 1, 1997. *Roach v. Warden*, Record No. 962568.

Roach's federal habeas petition was filed in the district court on February 12, 1998. On July 29, 1998, the district court ordered the petition dismissed. Roach's subsequent motion to alter or amend judgment was denied on August 25, 1998. On May 4, 1999, in a published opinion after full briefing and oral argument, the United States Court of Appeals for the Fourth Circuit denied Roach a certificate of appealability and dismissed the appeal. *Roach v. Angelone*, 176 F.3d 210 (4th Cir. 1999) (Pet. App. 1a). Roach's petition for rehearing and suggestion

for rehearing *en banc* was denied on June 1, 1999. (Pet. App. 84a).

On June 29, 1999, as required by Virginia Code § 53.1-232.1(iii), the Greene County Circuit Court set Roach's execution for August 25, 1999. (Pet. App. 85a). On August 6, 1999, the Virginia Supreme Court stayed Roach's execution pending disposition of a *coram vobis* appeal and successive habeas petition filed in that court raising issues unrelated to Roach's federal habeas petition. (Pet. App. 90a). The Virginia Supreme Court heard argument in the case on September 15, 1999, and a decision is expected by November 5, 1999.

B. Facts of the Offenses

The Virginia Supreme Court found the facts of the offenses to be as follows:

> On the evening of December 3, 1993, Mary Ann Hughes was shot and killed in her home about five miles west of Stanardsville. Hughes was standing at her open front door when she was shot. Her body was discovered the next day.
>
> The cause of death was a single shotgun wound to the chest, which caused injury to an artery, the chest wall, and the right lung. Dr. Deborah Kay, the medical examiner who performed the autopsy on Hughes, recovered shotgun pellets and wadding from Hughes's chest. The pellets and wadding were identified as number eight shot from a 12 gauge Remington shot shell case.
>
> The day before the killing, Roach brought a 12 gauge shotgun to a neighbor's house, and he and two friends engaged in shooting the gun in

the back yard using number eight shot. The police later recovered from the neighbor's back yard number eight shot that was consistent with a 12 gauge Remington shell case.

Roach and Hughes were also neighbors. Roach helped Hughes with household chores and also spent a great deal of time visiting her. The evidence showed that Roach was familiar with Hughes's habits, and that Hughes customarily deposited her social security check in the bank within the first few days of each month.

On the night she was killed, Hughes's purse, containing a Discover credit card and approximately sixty dollars in cash, was taken from her home. Hughes owned a 1981 Buick Regal, which also was taken.

In the early morning hours of December 4, 1993, Gregory Lee Giuriceo, Jr., a deputy sheriff for Nottoway County, noticed a Buick Regal parked in a parking lot of a shopping center in Blackstone. Roach was identified by Giuriceo as the operator of the car. After leaving the parking lot, Giuriceo determined that the automobile was registered to Hughes.

Later in the morning of December 4, 1993, Roach attempted to use Hughes's Discover bank card at an automated teller machine in Louisburg, North Carolina. A video tape from the machine showed Roach attempting to withdraw cash from Hughes's account.

On December 5, 1993, Trooper David F. Chavis of the South Carolina Highway Patrol observed a 1981 Buick Regal automobile with Virginia plates which was being driven at 69 miles per hour in a 55 mile per hour zone. He activated

the lights on his patrol car and proceeded behind the Buick. The driver of the Buick drove the automobile over to the left shoulder of the road, got out of the car, ran into the woods at the side of the road, and escaped. The driver was wearing clothes which matched the description of the clothes Roach had been seen wearing for the previous two days.

Trooper Chavis impounded the vehicle and traced its ownership to Hughes. Items retrieved from the automobile included Hughes's purse, a blue jacket, a number eight load shotgun shell, and a plastic bag from a Winn-Dixie grocery store. Mahlon Jones, a fingerprint expert employed by the Commonwealth's Division of Forensic Science, identified a latent palm print from the plastic bag as matching Roach's left palm print. In addition, latent fingerprints were recovered from the automobile which matched Roach's fingerprints.

Roach made several telephone calls to his aunt, Annie Betty Dean, while he was in North Carolina and South Carolina. During those telephone conversations, she asked him to "come home and give [himself] up." On December 6, 1993, Roach contacted Sheriff William L. Morris and arranged to come that day with his father to the Sheriff's Department for questioning.

At the Sheriff's Department, Morris advised Roach of his *Miranda* rights in the presence of Roach's father. Roach waived his rights, and both he and his father signed the waiver form. Sheriff Morris then questioned Roach out of his father's presence. Clarence Roberts, an acquaintance of the Roach family and an employee of

the Department of Alcoholic Beverage Control, was present with Morris during the interview.

At first, Roach told Morris that he and a friend, Scott Shifflett, went to Hughes's house on the evening of December 3, 1993. Roach said that Shifflett left the 12 gauge shotgun at the door, and that they entered the house and played Yahtzee with Hughes. Roach recounted that Shifflett then took the keys to the Buick Regal and the two began to leave the house. Roach said that, after he left, Shifflett ran back to the front door, fired one shot, and ran back to the Buick with Hughes's purse. According to Roach, Shifflett said that he had "fired through the roof to scare her."

Roach stated that Shifflett then jumped into the driver's seat of the Buick and they drove to North Carolina. He said that Shifflett must have tried to use Hughes's Discover credit card while Roach was in a Winn-Dixie store making some purchases. Roach also stated that he and Shifflett abandoned Hughes's vehicle in North Carolina.

During the questioning, Morris related to Roach certain evidence that had already been discovered, stating, "[W]ith all these discrepancies in the story, . . . I'm finding it really a little difficult to believe some of the things you're telling me." Roberts then told Roach that he knew Roach was lying and that "this is a heavy burden to carry on your shoulders for the rest of your life, if you committed this act you need to tell Sheriff Morris and you need to unburden yourself."

Roach then told Morris,

> I went over there and saw her counting the money and as I was leaving, I had the shotgun laying at the door and I shot her, took the money, the car and left, went to North Carolina. And I cashed – I tried to use – use the credit card but – about four times[,] but it wouldn't work.
>
> When asked where he shot Hughes, he answered, "In the chest."

Roach v. Commonwealth, 468 S.E.2d at 101-103. (Pet. App. 32a-35a). The Virginia Supreme Court's findings of fact on the matters raised on appeal must be presumed correct. 28 U.S.C. § 2254(e)(1) (state court findings of fact must be presumed correct and petitioner may overcome presumption only by clear and convincing evidence); *Sumner v. Mata*, 449 U.S. 539, 541-549 (1981) (statutory presumption of correctness applies to state appellate court's recitation of historical facts).

REASONS TO DENY CERTIORARI

I. THE FOURTH CIRCUIT'S RULING THAT ROACH'S "PROPORTIONALITY REVIEW" CLAIM RAISED ONLY A MATTER OF STATE LAW, AND THAT THE VIRGINIA SUPREME COURT'S GOOD FAITH APPLICATION OF STATE LAW RAISED NO DUE PROCESS ISSUE, PRESENTS NO COMPELLING REASONS FOR REVIEW.

Roach asserts that the Virginia Supreme Court misapplied *Virginia* law in conducting its "proportionality

review" of his death sentence.[1] Both courts below correctly ruled that Roach's claim presents no valid grounds for federal habeas corpus relief, and that the Virginia Supreme Court "conducted a thorough review of Roach's sentence in compliance with Virginia law." (Pet. App. 12a, 74a).

In *Pulley v. Harris*, 465 U.S. 37 (1984), this Court expressly held that appellate comparative proportionality review was not required by the Eighth Amendment:

> Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required.
>
> There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it.

465 U.S. at 50-51. Instead, the Court has looked to the methods States have employed at trial to satisfy the Eighth Amendment's requirement of narrowing the class of defendants eligible for the death penalty. *Pulley*, 465 U.S. at 48-50. *See also Tuilaepa v. California*, 512 U.S. 967, 971-972 (1994).

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[1] Virginia law provides that the Virginia Supreme Court must determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Va. Code § 17.1-313(C)(2) (formerly § 17-110.1(C)(2)).

In Virginia, the narrowing function is accomplished twice during the trial proceedings. In the guilt phase, the jury first must find the defendant eligible for the death penalty by considering his crime within a narrow class of statutorily defined capital murder. In the sentencing phase, the jury then must find an additional aggravating circumstance before a death sentence may be imposed, *see* Va. Code 19.2-264.4, thus further narrowing the death-eligible class. *See* Va. Code § 18.2-31; *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988) (narrowing function may be accomplished at guilt phase by narrow definition of capital offense and/or sentencing aggravating factors).

As this Court held in *Walton v. Arizona*, 497 U.S. 634 (1990), appellate comparative proportionality review is not required where, as in Virginia, the statutory procedures at trial adequately channel the sentencer's discretion:

> In effect, Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we "lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed – and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment." *McCleskey v. Kemp*, 481 U.S. 279, 306, 308, 95 L.Ed. 2d 262, 107 S.Ct. 1756 (1987); *Pulley v. Harris*, 465 U.S. 37, 43, 79 L. Ed. 2d 29, 104 S.Ct. 871 (1984). Furthermore, the Arizona Supreme

> Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

Walton, 497 U.S. at 655-656.

In Roach's case, the Virginia Supreme Court clearly conducted its review to determine: "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *See Roach*, 468 S.E.2d at 113-114. The Court compared Roach and his conduct to the defendants and crimes in other cases involving robbery and a "future dangerousness" finding, and concluded that "while there are exceptions, juries in this Commonwealth *generally* impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes." *Roach v. Commonwealth*, 468 S.E.2d at 114. Roach complains that his case, and his circumstances, should be deemed less aggravated than others the state court considered, but proportionality review under Virginia law does not require each capital case to "equal in horror the worst possible scenario yet encountered." *Turner v. Commonwealth*, 364 S.E.2d 483, 490 (Va.), *cert. denied*, 486 U.S. 1017 (1988). The Virginia Supreme Court's fact-intensive assessment of Virginia cases clearly presents no federal issue for this Court to review.

Roach thus asks that this Court do precisely what *Walton* holds is beyond the scope of federal collateral

review: to "look behind" the state court's application of state law and to redecide the state law issue. (Pet. Cert. at 10, n.6). He argues erroneously that *Evitts v. Lucey*, 469 U.S. 387, 401 (1985), permits a federal court to review the state-law mandated proportionality review. This Court, however, has not embraced such an expansive view of *Evitts*. *See Pennsylvania v. Finley*, 481 U.S. 551, 557-559 (1987) (distinguishing *Evitts*; state has "substantial discretion" in providing greater benefits than Constitution requires); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 284 (1998) (*Evitts* did not create new "strand" of due process to control clemency) (opinion of Rehnquist, C.J.); *see also Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1309 (9th Cir. 1996), *rev'd on other grounds*, 519 U.S. 1030 (1997) (*Evitts'* general statement cannot overcome specific ruling in *Walton v. Arizona* rejecting federal court review of state court proportionality analysis). The conclusion of both federal courts below, finding that the Virginia Supreme Court conducted the review contemplated by Virginia law in good faith, renders futile any due process objection to the state court's application of state law. (Pet. App 12a-13a).

Finally, to declare in this federal collateral proceeding that federal courts may review state court applications of state law issues, or that the Constitution requires proportionality review of Virginia cases, would be an impermissible new rule. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *Teague v. Lane*, 489 U.S. 288, 295-296 (1984).

II. THE FOURTH CIRCUIT'S RULING UPHOLDING THE STATE COURT'S FINDING OF SUFFICIENT EVIDENCE TO SUPPORT THE "FUTURE DANGEROUSNESS" AGGRAVATING CIRCUMSTANCE DOES NOT WARRANT REVIEW.

The Virginia Supreme Court found the evidence sufficient to demonstrate Roach's "future dangerousness" based on both his prior recent criminal record and the circumstances of the present offense. (Pet. App. 15a). Within a seven-month period prior to murdering Mrs. Hughes, Roach had burglarized a private residence, stolen a .357 Magnum pistol from that dwelling, committed two automobile larcenies, and violated a condition of his probation by carrying a shotgun. In this case, Roach killed his defenseless, elderly neighbor who "always had been kind to him" simply because he wanted her car and money. (Pet. App. 56a). After shooting her at point-blank range with a shotgun, Roach left her body in the doorway of her home and took her Social Security money and car keys.[2] The Virginia Supreme Court concluded:

> From this evidence, the jury was entitled to conclude that Roach placed little value on

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[2] Contrary to Roach's erroneous assertion (Pet. at 14), Virginia law permits a finding of future dangerousness based solely on the facts of the capital offense. Va. Code § 19.2-264.4(C) ("probability based upon evidence of the prior history of the defendant *or of the circumstances surrounding the commission of the offense*") (emphasis added); *Murphy v. Commonwealth*, 431 S.E.2d 48, 53 (Va.) ("future dangerousness" finding upheld solely on facts of the capital murder for hire; 19 year-old defendant had no prior felony record, no history of violence, expressed remorse and cooperated with police), *cert. denied*, 510 U.S. 928 (1993).

> human life and was willing to kill even a defenseless friend in order not to be identified as the perpetrator of a robbery. Given Roach's escalating pattern of criminal behavior culminating in the murder of Mrs. Hughes, the jury had sufficient evidence from which to find, beyond a reasonable doubt, that there was a probability that Roach would commit criminal acts of violence that would constitute a continuing serious threat to society.

Roach v. Commonwealth, 468 S.E.2d at 112 (footnote omitted).

Roach merely disagrees with the jury, the Virginia Supreme Court, the district court and the Fourth Circuit, all of which found sufficient evidence of his "future dangerousness." The Fourth Circuit's fact-specific conclusion that the state court reasonably rejected Roach's claim certainly fails to present any compelling reason warranting a Court to grant certiorari.

III. ROACH'S "PAROLE ELIGIBILITY" CLAIM WAS CORRECTLY REJECTED BY THE FOURTH CIRCUIT AND, IF ACCEPTED, WOULD VIOLATE THE "NEW RULE" DOCTRINE.

Roach asserts that he was entitled to have his jury informed that he would not be eligible for parole for 25 years if sentenced to life imprisonment. The Fourth Circuit correctly upheld the Virginia Supreme Court's rejection of Roach's claim. (Pet. App. 18a).

On direct appeal, the Virginia Supreme Court ruled that defendants, like Roach, who are *eligible* for parole, are not entitled to have the jury instructed on the time he

would become eligible for parole. *Roach*, 468 S.E.2d at 105. As the Fourth Circuit found, this ruling is consistent with *Simmons v. South Carolina*, 512 U.S. 154 (1994), where this Court carved out an exception to the long-standing rule that States were free to decide whether juries should be informed about parole eligibility. After *Simmons*, a capital murder defendant subject to the death penalty based on his "future dangerousness," who would be *in*eligible for parole as a matter of state law if sentenced to life imprisonment, is entitled as a matter of due process to inform the jury of that parole law. 512 U.S. at 177 (O'Connor, J., concurring).

Roach cannot benefit from the *Simmons* rule because he was not ineligible for parole. As Justice O'Connor's opinion makes clear, "[i]n a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact." 512 U.S. at 176. Justice Blackmun's opinion for four additional members of the Court agreed:

> In a state in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole.

512 U.S. at 168.

The lower federal courts also have refused to expand *Simmons* to include advising juries about potential parole eligibility. *See Boyd v. Johnson*, 169 F.3d 907, 912-913 (5th Cir. 1999); *Wilson v. Greene*, 155 F.3d 396, 407-408 (4th Cir.), *cert. denied*, 119 S.Ct. 536 (1998); *Arnold v. Evatt*, 113

F.3d 1352, 1363 (4th Cir. 1997). Roach's requested expansion of *Simmons* undoubtedly would be an impermissible new rule.[3] *See O'Dell v. Netherland*, 521 U.S. 151, 164-166 (1997) (*Simmons* itself announced a new rule).

IV. ROACH'S DEFAULTED CLAIM ATTACKING THE SENTENCING INSTRUCTION PRESENTS NO COMPELLING REASON FOR REVIEW.

Roach alleges that the trial court erred in giving the Virginia model jury instruction that specifies that the sentencing verdict must be unanimous. He asserts that the instruction misstates Virginia law because, in the absence of an agreement on sentence, the capital murder defendant receives life imprisonment. *See* Va. Code § 19.2-264.4(E).

Roach did not object to this instruction at trial, nor did he raise this claim on direct appeal.[4] Instead, he presented the claim to the Virginia Supreme Court for the first time in his state habeas petition and the state court expressly found the claim defaulted. The Fourth Circuit

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[3] In the Fourth Circuit Roach admitted that many state courts and other federal courts of appeals agree with the interpretation of *Simmons* adopted by the Virginia Supreme Court and the Fourth Circuit, and that the rule he sought "has never been expressly endorsed by a majority of the Justices of the Supreme Court. . . . " (Resp. App. 2), thus effectively conceding that he asks this Court to adopt and apply a new rule.

[4] Roach's own proffered verdict form for sentencing *also* recited that "[a]ny decision you make regarding punishment must be unanimous." (Resp. App. 4). His default thus cannot be any clearer.

correctly enforced the default and refused relief.[5] In his federal petition, Roach included a claim of ineffective assistance of *appellate* counsel in an effort to avoid his default of the jury unanimity claim. Both courts below, however, correctly concluded that this claim too was defaulted and also without merit. (Pet. App. 21a-22a). This Court obviously should not grant certiorari to review Roach's defaulted claim.

V. THE FOURTH CIRCUIT RULED CORRECTLY THAT NO ADDITIONAL ASSESSMENTS OF A JUVENILE'S MATURITY ARE CONSTITUTIONALLY REQUIRED BEFORE TRANSFER FOR TRIAL AS AN ADULT.

Roach alleges that Virginia law allowed his transfer from juvenile court to the circuit court for trial as an adult without providing for an individual inquiry into his maturity and culpability *prior* to transfer. On direct

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[5] Even if the default was not dispositive, the claim cannot merit relief. As a matter of Virginia law, the trial court should not instruct the jury that a life sentence will be imposed by the judge if the jury cannot agree. *See Spencer v. Commonwealth*, 384 S.E.2d 785, 799 (Va. 1989), *cert. denied*, 493 U.S. 1093 (1990) (proper to refuse instruction that tells jury court will impose life sentence if jury cannot agree on sentence); *Eaton v. Commonwealth*, 397 S.E.2d 385, 398-399 (Va. 1990), *cert. denied*, 502 U.S. 824 (1991) ("while Code § 19.2-264.4(E) provides for the imposition of a life sentence by the trial court when the jury cannot agree upon a penalty, the jury, nevertheless, has a duty conscientiously to attempt to arrive at a sentence."). In *Jones v. United States*, 119 S.Ct. 2090 (1999), in the context of reviewing the federal death penalty statute, this Court agreed with the Virginia Supreme Court's approach.

appeal, Roach raised a similar claim and the Virginia Supreme Court rejected the claim, relying on its prior decisions in *Wright v. Commonwealth*, 427 S.E.2d 379, 383-384 (Va. 1993), and *Thomas v. Commonwealth*, 419 S.E.2d 606, 609 (Va. 1992). *See Roach*, 468 S.E.2d at 105. (Pet App. 40a).

Roach's claim is based on his misreading of *Stanford v. Kentucky*, 492 U.S. 361 (1989). Contrary to Roach's assertion, *Stanford* did not impose a constitutional requirement that States provide a juvenile transfer proceeding that includes "individualized consideration of the maturity and moral responsibility" of juvenile offenders. Indeed, the Court there considered whether the Eighth Amendment permitted the execution of sixteen- or seventeen-year-old defendants. In one part of the *Stanford* decision, Justice Scalia identified the constitutional requirement of "individualized consideration" which exists in *every* capital case sentencing, and noted that the requirement of consideration of age is satisfied by state laws "specifically designating the defendant's age as a mitigating factor in capital cases."[6] *Stanford*, 492 U.S. at 375. Virginia law expressly includes the defendant's age as a matter the jury may consider in mitigation. *See* Va. Code § 19.2-264.4(B)(v). Justice Scalia's passing observation that statutes in Kentucky and Missouri also required assessments of the "maturity" of the juvenile at the transfer proceeding simply does not purport to impose an additional constitutional requirement.

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[6] This part of Justice Scalia's opinion, moreover, represented the view of only four Justices and, therefore, is not the holding of the Court.

Roach asks this Court now to declare a "new rule" to require a restructuring of States' juvenile transfer procedures, imposing a new pre-transfer constitutionally-required maturity hearing. Such a proposed rule may be considered, if at all, only in a direct appeal of a criminal conviction and not in federal collateral proceedings. *See Caspari*, 510 U.S. at 390; *Johnson v. Texas*, 509 U.S. 350, 352-353 (1993); *Teague*, 489 U.S. at 310.

The Fourth Circuit correctly upheld the Virginia Supreme Court's conclusion that Virginia's capital sentencing procedures allowed for the individualized consideration of the defendant's age as a mitigating factor. (Pet. App. 27a-28a). This Court should not grant certiorari to review a claim that, if accepted, would constitute an impermissible "new rule."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Excerpt from Brief of Petitioner-Appellant Steve Edward Roach, Fourth Circuit No. 98-26, page 26.....App. 1

Defendant's Refused Instruction AA .....App. 3

* * *

The Virginia Court did not indicate why legal and permanent "ineligibility" for parole is relevant to the issue of future dangerousness, even though "the fact that Roach would be eligible for parole in 25 years," and therefore will be for that period of time under 24-hour armed guard is not.[18] Nor did it explain why "the effect incarceration might have on Roach" was deemed to be a subject of "improper speculation," while speculation about future dangerousness in the abstract, counterfactually divorced from awareness of the alternative to death, apparently is "proper."

The very reasoning at the heart of this conclusion reached by the Supreme Court of Virginia compels a finding that the Constitutional right to due process is violated when future dangerousness is made a decisive issue, and yet the jury is not permitted information about the defendant's life if he is not executed. The situation is exacerbated where, as here, a juror asks a question concerning eligibility for parole and no answer is provided. Rather than eliminating "improper speculation," the Court's refusal to answer the question in fact made such speculation inevitable.

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[18] Actually, the Court did not say that parole ineligibility is not "relevant"; it said it was not "probative." It is hard to understand what this means, given that the burden of proof on the issue of future dangerousness is the Commonwealth's. Surely no one would contend that Steve – or anyone else – can "prove" that he would not be a continuing danger to society. The Supreme Court has never required proof, but merely reasoned prediction, regarding future dangerousness. *Jurek v. Texas*, 428 U.S. 262 (1976).

What Petitioner seeks here is not a "new rule" as that term is used in *Teague v. Lane*, 489 U.S. 288, 301 (1988) and its progeny. *Simmons* was decided before Petitioner's conviction became final. Roach seeks only an interpretation of *Simmons* consistent with its logic and true to its premises: one that, while it has never been expressly endorsed by a majority of the Justices of the Supreme Court, has surely never been rejected by them either.

* * *

INSTRUCTION No. AA

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant will be sentenced to (1) imprisonment for life or (2) imprisonment for life and a fine of a specific amount, but not more than $100,000.00 or (3) death by execution. However, before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravating circumstance:

> That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

If the Commonwealth has failed to prove that circumstance beyond a reasonable doubt, then you shall fix the punishment of the defendant at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

If you find from the evidence that the Commonwealth has proved that circumstance beyond a reasonable doubt, then you may fix the punishment of the defendant at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000.00; or

(3) Death by execution.

Any decision you make regarding punishment must be unanimous.

Supreme Court, U.S.
FILED
OCT 4 1999
OFFICE OF THE CLERK

No. 99-375

In The
Supreme Court of the United States

STEVE EDWARD ROACH,
Petitioner,

v.

DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Dated: October 4, 1999

138

TABLE OF CONTENTS

Table of Authorities ii
Introduction 1
Question 1: Proportionality 2
Question 2: Future Dangerousness 6
Question 3: The Alternative to Death 8
Question 4: Jury Dissension 9
Question 5: Rights of Young Defendants 10
Conclusion 10

TABLE OF AUTHORITIES

CASES

Brown v. Texas, 118 S. Ct. 355 (1997) 8, 9
Chandler v. Commonwealth, 455 S.E.2d 219, *cert. den.*, 116 S. Ct. 233 (1995) 4
Chichester v. Commonwealth, 448 S.E.2d 638 (1994), *cert. den.*, 115 S. Ct. 1134 (1995) 4
Evitts v. Lucey, 469 U.S. 387 (1985) 3, 6
Graham v. Collins, 506 U.S. 461 9
In re Gault, 387 U.S. 1 (1967) 10
Jones v. United States, 119 S. Ct. 2090 (1999) 10
Joseph v. Commonwealth, 452 S.E.2d 862 (1995) 4
Jurek v. Texas, 428 U.S. 262 (1976) 6
McKoy v. North Carolina, 494 U.S. 433 (1990) 10
Mills v. Maryland, 486 U.S. 367 (1988) 10
Murphy v. Commonwealth, 431 S.E.2d 48 (Va.), *cert. den.*, 510 U.S. 928 (1993) 7
O'Dell v. Netherland, 521 U.S. 151 (1997) 8
Pennsylvania v. Finley, 481 U.S. 551 6
Pulley v. Harris, 465 U.S. 37 (1984) 2, 5
Simmons v. South Carolina, 512 U.S. 154 (1994) 8, 9
Stanford v. Kentucky, 492 U.S. 361 (1989) 10
Teague v. Lane, 489 U.S. 288 (1984) 8
Walton v. Arizona, 497 U.S. 634 (1990) 5, 6
Yeatts v. Commonwealth, 410 S.E.2d 254 (1992) 4

STATUTES

Virginia Code § 16.1-260 *et seq* 1

THIS IS A CAPITAL CASE[1]

Steve Edward Roach, under sentence of death for a crime he confessed to having committed when he was 17 years old, has petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, seeking review and reversal of that court's decision denying him federal habeas corpus relief. The Attorney General of Virginia on September 23, 1999, submitted his opposition to that petition, and it is to that opposition that Petitioner now replies.

Introduction

The Commonwealth denies that Petitioner's constitutional rights have in any way been violated, although he was sentenced to die under a "future dangerousness" aggravator despite having had no record of violence against another human being until the murder for which he was condemned. With respect to each of the five reasons Petitioner presented to this Court for granting the writ, Respondent addresses a number of arguments not raised by Petitioner, and all but ignores those that he does raise.

For all of the reasons stated in the original Petition, as well as for those presented in reply to Respondent in these pages, the writ of certiorari should issue.

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[1] In his opening submission to this Court, Petition for a Writ of Certiorari ("Cert. Pet."), at pp. 1-2, Petitioner noted that an issue of State law has recently arisen that caused the Supreme Court of Virginia to stay his execution, and to permit an appeal to that court from a denial of relief by the trial court in Greene County. The issue concerns the proper interpretation of the provisions of the Virginia statute, Va. Code § 16.1-260 *et seq.*, according to which both parents of a juvenile defendant must be notified of his proposed transfer to a court of record for trial. Undersigned counsel hereby inform this Court that oral argument was held before the Virginia Supreme Court in Richmond, on September 15, 1999. If that court follows its regular procedures, a decision is to be expected on or about November 5, 1999. The stay of Petitioner's execution will remain in effect until resolution of the case on the merits by the Virginia Supreme Court.

QUESTION 1: PROPORTIONALITY

Petitioner contends that his sentence of death cannot be sustained under a proportionality review conducted according to elementary considerations of due process. This follows from the fact that a proportionality analysis – at least as that process is delineated by Virginia statute – is limited to the consideration of two elements: the defendant's demonstrated propensity to commit violent acts, and the nature of the capital crime itself. On both of those measures, a court charged by law with conducting a proportionality review in a manner consistent with due process cannot have come to the conclusion that the Virginia Supreme Court arrived at here. The record unequivocally shows that no defendant has been sentenced to death on the basis of future dangerousness in Virginia, since the restoration of the death penalty in 1976, (1) whose record of violence against persons has been less than that of Petitioner Steve Roach, and (2) whose crime – however reprehensible and heinous – involved no violence beyond that which was necessary to accomplish its terrible goal.

Respondent attributes to Petitioner the argument that "the Virginia Supreme Court misapplied *Virginia* law in conducting its 'proportionality review' of his death sentence." Brief in Opposition to Petition for Writ of Certiorari ("Op. Cert."), at pp. 6-7 (emphasis in original) (footnote omitted). But Petitioner has indicated from the outset his awareness of the limitations imposed by this Court's teachings in *Pulley v. Harris*, 465 U.S. 37 (1984). He has never contended that a failure of the highest court of the Commonwealth to apply State law correctly would entitle him to a claim under the United States Constitution. Petitioner does not ask this Court to assess the Virginia court's application of Virginia law.

Petitioner's argument, to which Respondent does not direct a substantial portion of his rebuttal, immediately concedes that "States are not obligated to assess the proportionality of death sentences." Cert. Pet., at p. 6. But

that is not the point; which is, rather, that however States choose to assay the fairness and equity of capital sentencing, those methods must comport with due process principles.

For this proposition, Petitioner cites this Court's decision in *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). This Court held, in that opinion, that even when a State acts in an area in which it has the greatest and freest discretion to determine outcomes under principles of federalism, "it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Id.*

Respondent now says that **whatever** method a State may choose with the intention of "narrowing the class of defendants eligible for the death penalty" will be sufficient: so long as "narrowing" has occurred (or may in principle occur), the Constitution is satisfied, and this Court as guardian of the Constitution has no role to play. But that is not the law. Petitioner submits not that *Evitts* "permits a federal court to review the state-law mandated proportionality review," Op. Cert., at p. 10, but rather that *Evitts* requires discretionary functions carried out by States to conform to the requirements of the Constitution. There is a world of difference.

The Supreme Court of Virginia surely **said** that it had compared Roach with similarly-situated defendants, and his offense to similar crimes, and stated its conclusion that "while there are exceptions, juries in this Commonwealth generally impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes." *Roach v. Commonwealth*, 468 S.E.2d 98, 114 (Va. 1996), *cert. den.*, 519 U.S. 951 (1996); Cert. Pet., at p. 58a. And that court even identified at least some of the cases that it canvassed in order to substantiate its generalization. The problem is simply that the cases cannot be read that way: it is impossible, even based on the decisions that the Virginia Supreme Court itself **said** it had reviewed, to conclude that juries in Virginia "generally" would sentence a Steve Roach – 17 years old, with no record of criminal

violence, and who had confessed to a one-gunshot murder – to death by lethal injection.[2]

A proportionality analysis must restrain itself to considering the defendant and the crime in comparison to others. His violent record, and the awfulness of his act, must be quantifiable in some meaningful if loose way, for proportionality review to make sense. And if a case presents values "off the charts" – that is, less than or equal to the next lowest value recorded in any prior case – on each measured criterion, then that sentence cannot be said to be "proportional" to others. That is not to say that no argument of principle or policy may be constructed in defense of the sentence meted out to this defendant. It requires only the conclusion that the sentence cannot be defended on grounds of proportionality. To sustain the sentence on the grounds of another justification despite its obvious lack of proportionality, or to excuse an evident absence of proportionality by appeal to other goals however defensible on their own, is to deny due process of law to an individual who has an entitlement to a particular kind of review of his sentence before it is carried out.

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[2] The Virginia court **said** it had considered as "similar" some 16 cases involving robberies in which it had affirmed death sentences on the grounds of future dangerousness. Those were cases that the court had previously compiled in *Yeatts v. Commonwealth*, 410 S.E.2d 254, 267-68 (1992), and in *Chichester v. Commonwealth*, 448 S.E.2d 638, 652 (1994), *cert. den.*, 115 S. Ct. 1134 (1995). Two additional capital sentences in "similar" cases had been affirmed after *Chichester*, but before *Roach*: *Chandler v. Commonwealth*, 455 S.E.2d 219, *cert. den.*, 116 S. Ct. 233 (1995), and *Joseph v. Commonwealth*, 452 S.E.2d 862 (1995). The court **said** it was also taking into account "capital murder cases in which robbery was the underlying offense and a sentence of life imprisonment was imposed," but it gave no clue as to which those cases might have been. Counsel for Petitioner presented to the circuit court below a comparative analysis of all 58 decided cases that seem to have met these criteria, but the court did not make reference to any of them in its decision, concluding only that it had no right to "look behind" what the Supreme Court of Virginia had concluded. Cert. Pet., at p. 11a. Petitioner submits that the Constitution requires this very "look."

Petitioner's submission is therefore not that he is entitled to proportionality review under federal law, an outcome precluded by *Pulley*. Nor is his challenge to an incorrect application of State law, which is not reviewable by this Court. His contention is that the State court did not do what it acknowledged that it had to do. The State court did not conduct an **incorrect** analysis of proportionality, perhaps erring by assigning too much importance to this precedent and too little to that. Petitioner submits that the Virginia Supreme Court, no matter what it **said** it had done, did not conduct a proportionality review at all.

Respondent professes to find this result foreclosed by the decision of this Court in *Walton v. Arizona*, 497 U.S. 639 (1990). But those parts of Justice White's decision in *Walton* representing the views of the Court stand for no such thing. In *Walton*, the petitioner challenged his sentencing under an "especially heinous, cruel, or depraved" aggravator (similar to the "vileness" aggravator in Virginia, which did not go to the jury in this case). This Court noted that the aggravating factor had been carefully defined by the Arizona Supreme Court, which had "sought to give substance to [its] operative terms." 497 U.S. at 654. Heinousness had "been construed by the Arizona courts in a manner that furnished sufficient guidance to the sentencer." 497 U.S. at 655.

On this basis, this Court observed that "[t]he Arizona Supreme Court plainly undertook its proportionality review in good faith." 497 U.S. at 656. When from those premises the Court arrived at the result that "[t]he Constitution does not require us to look behind that conclusion," *id.*, it was not saying that **any** pronouncement of a State supreme court will be opaque to this Court's scrutiny, but merely that the Arizona proceedings actually considered in *Walton* passed constitutional muster. That proposition cannot be stretched to the extent that the Commonwealth would have this Court do now.

For the very reasons discussed in *Walton*, the "proportionality analysis" of the Virginia Supreme Court was not erroneous, it was non-existent. *Walton* does not address such a situation, and surely it does not slam the door of the courthouse in the face of someone condemned to death in violation of due process. The so-called proportionality analysis of the Virginia Supreme Court was constitutionally defective, within *Evitts*, and should now be set aside.[3]

QUESTION 2: FUTURE DANGEROUSNESS

Petitioner Roach does not "merely disagree[] with the jury," and with the reviewing courts, as to the sufficiency of the evidence of his future dangerousness, as Respondent would have it. Op. Cert., at p. 12. Rather, his contention is that, since the future dangerousness aggravator is intended to restrict the universe of persons eligible for the ultimate punishment – even after conviction of terrible offenses – there must be a constitutional standard by which that restrictive effect may be measured. If the prosecutor may seek the death penalty even against a defendant like Steve Roach, aged 17 and without an appreciable criminal record, then the future dangerousness hurdle is set so low as to be meaningless.

This Court has upheld special issues, or aggravators, submitted to juries in capital cases, ever since its decision in *Jurek v. Texas*, 428 U.S. 262 (1976). It has held them to be reasonable bases for channeling juries' discretion, and for permitting juries to make distinctions between those defendants deserving to die and those who should be permitted to live despite having committed awful acts.

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[3] That a State may provide **greater** benefits than those constitutionally required, and may not be challenged in federal court for doing so erroneously – *Pennsylvania v. Finley*, 481 U.S. 551, 557-59, *see* Op. Cert., at p. 10 – is clearly of no relevance here. Petitioner would be quite content with a proportionality review according to minimum federal constitutional standards of due process, and asks for no special concession provided by either the Legislature or the courts of the Commonwealth of Virginia.

Even if future dangerousness may be inferred from the mere facts of the capital crime itself – a proposition that the Commonwealth says that is "contrary to Petitioner's erroneous assertion," Op. Cert., at p. 11, n. 2, but that he actually has never contested – there is simply no basis for that extraordinary inference here. The killing of Mary Hughes was a terrible thing, the magnitude of which no one wishes to diminish, but it was committed without any of the usual indicia of future dangerousness.

There was nothing about the crime itself that would indicate, simply as a matter of logic, any future threat to society on the part of its perpetrator. It was, indeed, a shooting at point-blank range, and it is true that Ms. Hughes was a person who had shown dedication to Petitioner, which he had regularly reciprocated.[4] It is true that he stole her money and her car. The Commonwealth, and the court below, seem to find in those facts sufficient basis for moral outrage to justify the capital sentence in this case. But Petitioner respectfully submits that moral outrage is not the issue before this Court: compliance with constitutional standards is. The relationship between Petitioner and his victim is not relevant to his potential dangerousness absent evidence of his treatment of others close to him. And no witness at trial – surely no one proffered by the Commonwealth – testified that he was in fact likely to harm another individual, much less another friend. He had had no record of such behavior, and no one testified that this single event, however inhuman and inexplicable, indicated a change in his personality of that magnitude.

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[4] Indeed, the trial judge withdrew the "vileness" aggravator from the jury, over the Commonwealth's objection. This alone is enough to distinguish this case from *Murphy v. Commonwealth*, 431 S.E.2d 48 (Va.), *cert. den.*, 510 U.S. 928 (1993), upon which the Attorney General relies. *See* Op. Cert., at p. 11, n. 2. It may be that the defendant in *Murphy* had no criminal record, but in that case, three different aggravating circumstances – murder for hire (carried out with deliberate and apparently elaborate planning), vileness, and future dangerousness – were **all** found to be present.

QUESTION 3: THE ALTERNATIVE TO DEATH

Petitioner made the argument in his opening submission that this is is the case anticipated by Justice Stevens and three other Justices in *Brown v. Texas*, 118 S. Ct. 355 (1997) (*mem. respecting denial of cert.*). He suggested that in this case, as in *Brown*, not informing the members of the sentencing jury of certain truths of which only they – among all of those in the courtroom – were ignorant, is "perverse," and "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose." 118 S. Ct. at 356.

Respondent limits his opposition on this point to the tired and predictable contention that Petitioner is advocating a "new rule," precluded under *Teague v. Lane*, 489 U.S. 288 (1984). Op. Cert., at pp. 12-14. But that some courts, including the Fourth Circuit, have regularly erred in understanding this Court's teaching in *Simmons v. South Carolina*, 512 U.S. 154 (1994), does not make the correct interpretation a "new rule." *O'Dell v. Netherland*, 521 U.S. 151 (1997) is obviously inapposite: Petitioner need not and does not argue that *Simmons* itself was not a "new rule." Roach, unlike O'Dell, of course, was tried after *Simmons* was decided.

In *Simmons* itself, Justice Blackmun wrote: "It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States." 512 U.S. at 169 (opinion of Blackmun, J.). In the context of a determination of hypothetical or conditional, as opposed to future, dangerousness therefore, it is as clear as can be that outcomes are determined on the basis of comprehension of the premises. It literally makes no sense to ask jurors whether a convicted defendant "would" be a future danger to society without positing the premises of the conditional voice: "would" he be a danger on what assumption? If the premise itself is undetermined, then the jury should be advised that any assumption it makes is necessarily speculative; but if the premise is known, either as a

matter of law (as in South Carolina at the time of Simmons's trial, or as in Virginia now), or as a matter of fact, then withholding that information from the jury is entirely wrong.

The jurors deciding whether Steve Roach "would" be a future danger to society needed to know that there was literally no chance that he could walk free in society in less than 25 years. Since they were not told this truth, they asked the trial judge to explain to them the term "life" imprisonment: the very term Justice Blackmun for a Court plurality acknowledged that most jurors do not understand. This was important not only for the members of the jury to appreciate the consequences of their decision, but for them to be able to answer the question before them according to their oaths.

The simple truth, anticipated by Justice Souter in *Graham v. Collins*, 506 U.S. 461, 518 n. 10 (Souter, J., dissenting), seen by a majority of the Court in *Simmons*, and capsulized by four Justices in *Brown*, is that questions of "future dangerousness" do not rise even to the level of speculation if the premise of the conditional question is not provided. They ask for counterfactual imagining, for unreality. They do not provide the guidance in the invocation of the ultimate penalty that this Court has consistently held since 1976 to be a bastion of constitutional dimension.

QUESTION 4: JURY DISSENSION

Respondent makes no argument at all on the merits to address Petitioner's submission regarding jury unanimity. Petitioner has argued that the judge's instruction directing them that they had to be unanimous to impose a sentence of either life or death – plainly incorrect under Virginia law – had the effect of putting on any juror who might have favored a sentence of life an unacceptable pressure to conform to the majority. This is tantamount to imposing on a criminal defendant the obligation to persuade all of his jurors of the existence of a premise in mitigation of his sentence, which is

unconstitutional under *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v. North Carolina*, 494 U.S. 433 (1990).

This Court concluded in its decision last Term, in *Jones v. United States*, 119 S. Ct. 2090 (1999), that erroneous instructions regarding jury unanimity were not fatal to the sentence in that case precisely because "there is no reasonable likelihood that the jury applied the instructions incorrectly." 119 S. Ct. at 2103. Here, by contrast, there is every reason to believe that incorrect understanding is just what happened, especially given the jury's question concerning the meaning of life imprisonment. The trial judge effectively told any juror holding out for a non-capital sentence that she might as well give up. That error may well cost Petitioner his life.

QUESTION 5: RIGHTS OF YOUNG DEFENDANTS

If a juvenile defendant has a constitutional right to an "individualized consideration" of his capacity for legal culpability, *see Stanford v. Kentucky*, 492 U.S. 361, 375 (1989), before he may be required to be tried as an adult, then the Virginia transfer scheme in force at the time of Petitioner's trial was unconstitutional.

The Commonwealth's entire argument here is that Petitioner misreads *Stanford*. Op. Cert., at pp. 15-17. But it is Respondent who errs in his understanding of this Court's precedents: Petitioner's view of *Stanford* is entirely consistent with the teaching of this Court in such cases as *In re Gault*, 387 U.S. 1 (1967), with respect to the special place reserved for children in our legal system.

CONCLUSION

For all of the foregoing reasons, as well as for those set out in the Petition herein, the writ of certiorari should be granted.

Respectfully submitted,

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